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IN THE

Supreme Court of the United States

October Term, 1969

1120
OCT 1968

No. 62

JACK R. GOLDBERG, Commissioner of Social Services,
Appellant,

v.

JOHN KELLY, RUBY SHEAFE,
TERESA NEGRON, *et al.*,
Appellees.

Appeal from the United States District Court for the Southern District of New York

APPENDIX

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Jurisdictional Statement Filed March 6, 1969
Probable Jurisdiction Noted April 21, 1969

TABLE OF CONTENTS

	PAGE
Relevant Docket Entries	1a
Order to Show Cause in *Kelly* v. *Wyman*	6a
Summons	9a
Complaint for Three-Judge Court, Declaratory Judgment and Injunctive Relief	10a
Affidavit of Stephen Wizner in Support of Complaint	29a
Exhibit—Letter Dated January 17, 1968	36a
Affidavit of Marilyn Becker in Support of Complaint	37a
Affidavit of Peter H. Darrow in Support of Complaint	40a
Affidavit of Edward V. Sparer in Support of Complaint	44a
Notice of Motion for Preliminary Injunction, Convening of Three-Judge Court, and Class Action Order	49a
Affidavit of Henry A. Freedman in Support of Plaintiffs' Motion	52a
Notice of Defendants' Motion to Dismiss Complaint	54a
Affidavit of Joel H. Sachs in Support of Defendants' Motion	55a
Exhibit A—Newly Adopted Section 351.26	60a
Order to Show Cause in *Sheafe* v. *Wyman*	63a

PAGE

Complaint for Three-Judge Court, Declaratory Judgment and Injunctive Relief 66a

Exhibit A—Notice of Discontinuance of Grant Dated February 5, 1968 ..... 76a

Affidavit of Richard Kwasnik in Support of Complaint 78a

Affidavit of Richard Kwasnik in Support of Complaint 82a

Exhibit 1—Decision After Hearing 87a

Exhibit 2—Request for Fair Hearing 91a

Affidavit of Esther Lett in Support of Complaint 92a

Affidavit of David Gilman in Support of Complaint 95a

Affidavit of Luis M. Neco in Opposition to Plaintiffs' Motion and in Joinder of Defendants' Cross-Motion 98a

Affidavit of Merrill Charlton in Opposition to Plaintiffs' Motion and in Support of Remaining Defendants' Cross-Motion 104a

Notice of Defendants' Motion to Dismiss Complaint 109a

Affidavit of Joel H. Sachs in Support of Defendants' Motion 111a

Supplemental Affidavit of Merrill Charlton in Support of Defendants' Motions 113a

Exhibit A—Note Dated February 28, 1968 ..... 114a

Affidavit of David Gilman in Support of Foregoing Complaint 116a

PAGE

Supplemental Affidavit of Merrill Charlton in Support of Defendants' Motions 118a

Affidavit of Samuel Felder in Support of Defendants' Motions 121a

Supplemental Affidavit of Luis M. Neco in Support of Defendants' Motions 124a

Supplemental Affidavit of Joel H. Sachs in Support of Defendants' Motions 125a

Exhibit—Newly Adopted Section 351.26 ..... 127a

Opinion of Bryan, D.J. 131a

Order of Bryan, D.J. 139a

Order of Lumbard, C.J. 140a

Amending Order of Bryan, D.J. 141a

Notice of Motion for Summary Judgment by Defendants Goldberg et al. 143a

Affidavit of Jack R. Goldberg in Support of Defendants' Motion 145a

Affidavit of Jack R. Goldberg in Support of Defendants' Motion 147a

Exhibit 1—New Procedure for Clients' Right of Review 149a

Notice of Motion for Summary Judgment by Defendants Wyman et al. 150a

PAGE

Affidavit of John H. Sachs in Support of Defendants' Motions 152a

Exhibit A—Newly Adopted Section 351.26 ..... 127a

Exhibit B—Resolution of New York State Board of Social Welfare 160a

Exhibit C—Opinion of District Court for the Northern District of California in *Wheeler* v. *Montgomery* 162a

Motion to Intervene and for Leave to Intervene as Plaintiffs 164a

Intervenors' Complaint for Declaratory Judgment and Injunctive Relief 167a

Exhibit A—Affidavit of Marian Davidson 200a

Exhibit B—Notice of Suspension of Public Assistance to Mr. & Mrs. Mack Fuller 202a

Exhibit C—Notice of Discontinuance of Public Assistance to Mr. and Mrs. Mack Fuller 204a

Exhibit D—Decision After Fair Hearing in Matter of Magdalena Mulei 206a

Exhibit E—Notice of Intent to Suspend Public Assistance to Magdalena Mulei 208a

Exhibit F—Notice of Discontinuance of Public Assistance to Maria Fuentes 210a

Exhibit G—Decision After Fair Hearing in the Case of Maria Fuentes 212a

Exhibit H—Affidavit of Minnie Porter 214a

Exhibit I—Decision After Fair Hearing in the Case of Ina Sidor 216a

PAGE

Exhibit J—Notice of Change in Grant to Confesora Oyola 218a

Exhibit K—Notice of Discontinuance of Public Assistance to F. Gomez 220a

Exhibit L—Notice of Intent to Discontinue Public Assistance to Antonio Soto 222a

Exhibit M—Letter, Dated June 5, 1968 ..... 224a

Exhibit N—Notice of Decision, After Review, to Discontinue Public Assistance to Antonio Soto 226a

Exhibit O—Review of Case of Antonio Soto 228a

Exhibit P—Letter, Dated May 22, 1968 ..... 230a

Exhibit Q—Notice of Intent to Discontinue Public Assistance to Mary Holmes 232a

Exhibit R—Notice of Discontinuance of Public Assistance to Mary Holmes 234a

Plaintiff-Intervenors' Motion for Preliminary Injunction 236a

Plaintiffs' Motion to Dissolve Stay of Discovery and to Produce Under Rule 34 ..... 238a

Plaintiffs' Motion for Leave to Amend Complaint 243a

Affidavit of Lee A. Albert in Support of Plaintiffs' Motion 248a

Affidavit of Lee A. Albert in Support of Plaintiffs' Motion 253a

Affidavit of Clara Eisner in Opposition to Defendants' Motions for Summary Judgment 257a

PAGE

Affidavit of Neal I. Rosenthal in Opposition to Defendants' Motion 262a

Exhibit A—Schedule of Fair Hearing Decisions 264a

Affidavit of Harold Weinberger in Opposition to Defendants' Motions 266a

Exhibit A—Schedule of Fair Hearing Decisions 268a

Affidavit of Beaulah E. Saunders in Opposition to Defendants' Motions 270a

Affidavit of Allen R. Viani in Opposition to Defendants' Motions 272a

Affidavit of Donald H. Fuchs in Opposition to Defendants' Motions 275a

Affidavit of Blanche Grief in Opposition to Defendants' Motions 277a

Affidavit of Murray J. Hirsh in Opposition to Defendants' Motions 279a

Affidavit of Abraham Kaufman in Opposition to Defendants' Motions 281a

Affidavit of James McKeon in Opposition to Defendants' Motions 283a

Affidavit of Ann W. Rosenhaft in Opposition to Defendants' Motions 285a

Affidavit of Francis M. Weldon in Opposition to Defendants' Motions 287a

Affidavit of David Gilman in Opposition to Defendants' Motions 289a

PAGE

Affidavit of Richard Greenberg in Opposition to Defendants' Motions 292a

Affidavit of Cesar A. Perales in Opposition to Defendants' Motions 296a

Plaintiffs' Exhibit "18" in Opposition to Defendants' Motions—Decision After Fair Hearing in Case of Plaintiff Sheafe 298a

Plaintiffs' Exhibit "19" in Opposition to Defendants' Motions—Levels of Approval and Review 300a

Plaintiffs' Exhibit "20" in Opposition to Defendants' Motions—Article 302a

Plaintiffs' Exhibit "21" in Opposition to Defendants' Motions—Judgment of Alameda County Superior Court of California in *McCullough* v. *Terzian* 304a

Affidavit of Robert B. Keyes in Support of Defendants' Motions 308a

Exhibit—Fair Hearing Reports for April 1968 .... 318a

Affidavit of Jack R. Goldberg in Support of Defendants' Motions 320a

Affidavit of Merrill Charlton in Support of Defendants' Motions 322a

Exhibit—Amendment of §352.5 of Title 18, NY CRR 330a

Affidavit of John J. Loflin in Support of Defendants' Motions 332a

Exhibit—Federal Procedures 334a

PAGE

Affidavit of Magdalena Mulei in Opposition to Defendants' Motions 336a

Affidavit of Alma Coldburn in Opposition to Defendants' Motions 338a

Affidavit of Angelina Velez in Opposition to Defendants' Motions 340a

Affidavit of Marianne Rosenfield in Opposition to Defendants' Motions 342a

Affidavit of Alma Coldburn in Opposition to Defendants' Motions 346a

Affidavit of Louise Gruner Gans in Opposition to Defendants' Motions 348a

Affidavit of Robert B. Keyes in Support of Defendants' Motions 352a

Affidavit of Joel H. Sachs in Support of Defendants' Motions 354a

Exhibit—New Regulation 354a

Affidavit of Robert B. Keyes in Support of Defendants' Motions 356a

Exhibit—Fair Hearing Report for June 1968 ..... 356a

Affidavit of Joel H. Sachs in Support of Defendants' Motions 358a

Exhibit—Fair Hearing Reports for July and August 1968 ..... 358a

PAGE

Affidavit of Joel H. Sachs in Support of Defendants' Motions 360a

Exhibit—Fair Hearing Reports for September and October 1968 ..... 360a

Decision After Fair Hearing in Case of Angeline Velez 362a

Opinion of Three-Judge District Court 365a

Order of Three-Judge Court 393a

Appellants' Application for Stay of District Court Order 396a

Denial of Stay by Mr. Justice Harlan 401a

Stipulation Extending Stay to January 13, 1969 ..... 402a

Notice of Appeal to the Supreme Court of the United States by Defendants Goldberg, *et al.* 403a

Notice of Appeal to the Supreme Court of the United States by Defendants Wyman, *et al.* 406a

Stipulation Withdrawing Appeal of Defendants Wyman *et al.* 409a

Order to Transmit Papers 410a

Affidavit of John J. Loflin in Support of Motion for Order to Transmit Papers 411a

Relevant Docket Entries

68 Civ. 394 *John Kelly, et al.* vs. *George K. Wyman, et al.*

Date	*Proceedings*
Jan. 29-68	Filed complaint and issued summons.
Feb. 1-68	Filed pltffs' affdvts. & notice of motion for preliminary injunction, etc.—ret. 2-13-68.
Feb. 27-68	Filed Notice of Motion re: Dismiss complaint. Ret. 3/5/68.
Mar. 4-68	Filed Affidavit in opposition to pltfs'. motion and in joinder of defts. cross-motion.
Mar. 14-68	Filed Supplemental Affidavit of Merrill Charlton.
Mar. 25-68	Filed Reply Affidavit.
Mar. 25-68	Filed Supplemental Affidavit of Merrill Charlton.
Apr. 4-68	Filed stip. & order of consolidation of 68 Civ. 864 with 68 Civ. 394 for all purposes, all further docket entries to be carried under this number (68 Civ. 394).—Bryan, J.
May 9-68	Filed Affidavit of Jack R. Goldberg. (To Bryan)
May 17-68	Filed Opinion #34801. Bryan, J. * * * I will notify the Chief Judge of this Circuit that the consolidated action should be heard before a 3-judge court pur. to 28 USC 2281-84. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted should also be heard before the full court. Plaintiffs' motion for temporary injunctive relief is denied. It is so ordered. (mailed notice) (Also in 68 Civ. 864)
May 28-68	Filed order designating a 3 judge court to hear all applications for temporary & final relief, etc., said 3 judge court to be designated 6-26-68 at 10:30 a.m. in courtroom 1505. — Bryan, J. — mailed notice (To Judge Bryan)

Relevant Docket Entries

Date	*Proceedings*
May 28-68	Filed Designation of the following judges, in addition to Hon. Frederick vanPelt Bryan to hear and determine said cause: Hon. Wilfred Feinberg, U.S. Circuit Judge, and Hon. Edward C. McLean, U.S. District Judge, S.D.N.Y. Signed Lumbard, Ch. J. U.S.C.A.
May 29-68	Filed notice to counsel of appointment of 3 judge court & hearing set for 6-26-68 at 10:30 A.M. in Rm. 1505.—Clerk
June 10-68	Filed order amending order filed 5-28-68 (see order).—Bryan, J.—mailed notice
June 17-68	Filed deft's (Goldberg) affdvt. & notice of motion for summary judgment—ret. 6-26-68 at 10:30 A.M. in Rm. 1505
June 17-68	Filed defts' (Wyman, et ano.) affdvt. & notice of motion for summary judgment—ret. 6-26-68 at 10:30 A.M. in Rm. 1505
June 17-68	Filed pltffs' affdvt & notice of motion for preliminary injunction—ret. 6-26-68 at 10 A.M. in Rm. 1505
June 17-68	Filed pltff.-intervenors (Columbia University Center of Social Welfare Policy & Law) notice of motion to intervene as pltffs.—ret. 6-26-68 at 10 A.M. in Rm. 1505
June 17-68	Filed pltffs' affdvt. & notice of motion to dissolve stay of discovery & to produce—ret. 6-26-68 at 10 A.M. in Rm. 1505
June 17-68	Filed pltff.-intervenors' affdvt. & notice of motion for leave to amend complaint—ret. 6-26-68 at 10 A.M. in Rm 1505
June 24-68	Filed Affidavit of Joel H. Sachs in opposition to motion to amend complaint.
June 24-68	Filed Affidavits and Exhibits in opposition to defts'. motions for summ. judgmt.

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Relevant Docket Entries

Date	*Proceedings*
ly 8-68	Filed Affidavit of Robert B. Keyes.
ly 8-68	Filed Affidavit of Jack R. Goldberg.
ly 8-68	Filed Affidavit of John J. Loflin. (Also in 68 Civ. 864)
ly 8-68	Filed Affidavit of Magdalena Mulei.
ly 8-68	Filed Affidavit of Angelina Velez.
ly 12-68	Filed Affidavit of Marianne Rosenfield.
ly 12-68	Filed Affidavit of Alma Coldburn. (Also in 68 Civ. 864)
ly 12-68	Filed Affidavit of Louise Gruner Gans. (Also in 68 Civ. 864)
ly 15-68	Filed Affidavit of Robert B. Keyes, and Fair Hearing Report for June 1968.
ly 22-68	Filed Affidavit of Robert B. Keyes.
ept. 12-68	Filed Affidavit of Joel H. Sachs.
ov. 26-68	Filed Brief of the United States Amicus Curiae. (Also in 68 Civ. 864)
ov. 26-68	Filed OPINION #35382 Feinberg, C.J., Bryan and McLean, D. Judges. (Also in 68 Civ. 864). * * * Plaintiffs' motion to amend complaint in the consolidated case is granted, as is the motion of the 12 intervenors to intervene. SETTLE ORDER ON NOTICE: if defts. desire a stay pending appellate review, their proposed order should so provide.
ec. 3-68	Filed Affidavit of Joel H. Sachs, Asst. Attorney Genl.
ec. 13-68	Filed order defts. enjoined; pltffs' motion for prel. injunc. is denied; pltffs' complaints are deemed amended; motion of proposed intervenors to intervene is granted; pltffs' motion to dissolve the stay of discovery proceedings is denied; defts' motion for summary judgment is denied; this order is stayed to 12-30-68, etc.—Feinberg, C.J.; Bryan, J. & McLean, J.—mailed notice. Judgment entered—Clerk (ent. 12-16-68)

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Relevant Docket Entries

Date	*Proceedings*
Dec. 26-68	Filed Stip. and Order—extending stay of order of th Court of 12-13-68 expiring on 12-30-68 to be extend to 1-13-69 so as to allow response to the application the City of New York for a further stay from the U Supreme Court served 12-23-68. So ordered—Fei berg, CJ; Bryan, J. and McLean, J.
Jan. 6-69	Filed deft. Jack R. Goldberg Notice of Appeal to the S preme Court of the U.S. (with proof of service on L A. Albert, Henry A. Freedman, 401 W. 117th Stre N.Y., Louis J. Lefkowitz, 80 Centre Street, N.Y., Edw L. Weisl, Dept. of Justice, Washington, D.C. and Ro ert M. Morgenthau, Foley Sq., New York
Jan. 8-69	Filed Defs. other than Jack R. Goldberg—Notice of Appe to the Supreme Court of the U.S.
Feb. 13-69	Filed Order—Clerk of this Court is authorized and direct to transmit to the Clerk of the Supreme Court all t original papers filed in the office of the Clerk of th Court which are the record on appeal. The recor be returned to the Clerk of this Court upon conclusi of this appeal.—Weinfeld, J.
Apr. 5-68	Filed defts. supplemental affdvt. (Luis M. Neco) to appri this court of recent developments related to the i stant proceedings.
Apr. 30-68	Filed defts. supplemental affdvt. (Joel H. Sachs) to appri this court of recent developments related to this i stant proceeding.
68 Civ. 864	*Ruby Sheafe, et al.* vs. *George K. Wyman, indiv., etc., et*
Feb. 29-68	Filed complaint and issued summons
Mar. 4-68	Filed pltff's (Sheafe) affdvt. & show cause order for pr liminary injunction—ret. 3-5-68

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Relevant Docket Entries

Date	*Proceedings*
r. 7-68	Filed defts' (Wyman, et ano.) affdvt. & notice of motion to dismiss complaint—ret. 3-19-68
r. 11-68	Filed summons & return, served defts. by Merrill Charlton 3-7-68
r. 14-68	Filed Affidavit in opposition to pltfs. motion for pre. injunction.
r. 4-68	Filed stip. & order consolidating this action with 68 Civ. 394 for all purposes, all further docket entries to be carried under that number.—Bryan, J. (filed in 68 Civ. 394)

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Order to Show Cause for Temporary Restraining Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 394-1968

JOHN KELLY, *et al.*,

Plaintiffs,

v.

GEORGE K. WYMAN, *et al.*,

Defendants.

Let defendants show cause, in Room 506 of the United States Courthouse, Foley Square, New York, New York, on the day of January, 1968, at 10:00 a.m., or as soon thereafter as counsel may be heard, why a temporary restraining order pursuant to Title 28 United States Code Section 2284 should not issue restraining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from

(1) refusing to pay the named plaintiffs herein their regular public assistance grants, to wit, semi-monthly payments in the amounts indicated: John Kelly, $80.05; Randolph Young, $57.00; Juan De

Jesus, $56.80; Pearl Frye, $126.00; Pearl McKinney, $155.00; and Altagracia Guzman, $80.00; and

(2) terminating aid to any recipient of public assistance without giving advance written notice stating the reason for such action and without affording such recipient an opportunity for a hearing prior to withdrawal of aid,

pending the hearing and determination of plaintiffs' motion for a preliminary injunction by a three-judge court convened pursuant to Title 28 United States Code Sections 2281 and 2284.

Plaintiffs seek this temporary restraining order on the grounds that:

1. They are each suffering, or threatened with imminent suffering of, irreparable injury in that they are without means to provide for themselves the basic necessities of food, clothing and shelter and will continue to suffer even greater deprivation until they are restored to full public assistance,

2. The issuance of a temporary restraining order will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiffs,

3. The statutes and regulations which deny plaintiffs a hearing prior to termination, suspension or reduction of public assistance violate plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States, and

4. Plaintiffs have no adequate remedy at law, as set forth more fully in the verified complaint and the affidavits

Order to Show Cause for Temporary Restraining Order

of Edward V. Sparer, Stephen Wizner, Peter H. Darrow and Marilyn Becker, attached hereto.

It Is Ordered that service of this Order on defendants on or before ..... on the ..... day of January, 1968 be deemed sufficient.

Done and ordered at the United States Courthouse, Foley Square, New York, New York, this ..... day of January, 1968 at .....

United States District Judge

Summons

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the above named Defendants:

You are hereby summoned and required to serve upon Harold J. Rothwax, Esq., 320 East 3rd Street, New York, New York; Mary B. Tarcher, Esq., 11 Park Place, New York, New York; and Martin Garbus, Esq., 156 5th Avenue, New York, New York, plaintiff's attorneys, whose addresses are set out above an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN J. OLEAR, JR.
Clerk of Court.

Date: January 29, 1968.

[Seal of Court]

Complaint for Three-Judge Court, Declaratory Judgment, Injunctive Relief

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

I

This is an action for injunctive and declaratory relief authorized by Title 42 U.S.C. 1983 to secure rights, privileges and immunities established by the Fourteenth Amendment to the Constitution of the United States and the Social Security Act, Title 42 U.S.C. 301 et seq., and the regulations promulgated thereunder. Jurisdiction is conferred on this Court by Title 28 U.S.C. 1343(3) and (4) providing for original jurisdiction of this Court in suits authorized by Title 42 U.S.C. 1983; and jurisdiction is further conferred on this Court by 28 U.S.C. 2201 and 2202 relating to declaratory judgments.

II

This is a proper case for determination by a three-judge court pursuant to Title 18 U.S.C. 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing and implementing Sections 213 (2), 214, 304, 325, 350 (2) (6), and 253 (2) of the New York Social Services Law, Section 351.22 and 256.4 of Volume 18, Official Compilation of Code, Rules and Regulations of the State of New York (hereafter referred to as 18 N.Y.C. R.R.), Sections 84.2-84.23 of 18 N.Y.C.R.R. promulgated

by the New York State Board of Social Welfare to supersede Section 351.22 and 356.4 on March 1, 1968, and related statutes, rules and regulations, insofar as these statutes and regulations require termination or suspension of financial aid in the form of public assistance [Aid to Families with Dependent Children (AFDC), Aid to the Aged, Blind and Disabled (AABD) and Home Relief (HR)] prior to the granting of adequate notice and opportunity to be heard, on the grounds of the invalidity of said statutes and regulations under the Constitution and laws of the United States.

III

This action seeks an injunction and declaratory judgment restraining the enforcement of, and declaring unconstitutional, the aforesaid state statutes and state-wide rules and regulations, on their face and as applied and interpreted by defendants, on the grounds that said statutes, rules and regulations, and actions taken pursuant thereto, deprive plaintiffs of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and, so far as the AFDC and AABD programs are concerned, deprive plaintiffs of the "fair hearing" guaranteed by the Social Security Act, in that said statutes, rules and regulations deny to plaintiffs an opportunity for a hearing prior to termination or suspension of financial aid under the public assistance program.

IV

Plaintiffs John Kelly, Randolph Young, and Juan De Jesus are adult citizens of the United States and residents of the City and State of New York who received public assistance until aid was terminated without notice and without a hearing.

Plaintiffs Pearl McKinney and Pearl Frye are adult citizens of the United States and residents of the City and

State of New York who received public assistance until aid was terminated without a hearing.

Plaintiff Altagracia Guzman is an adult citizen of the United States who faces imminent termination of her public assistance benefits if she does not accede to a demand of the New York City Department of Social Service, for which demand the Department has no basis in law.

V

Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other recipients of public assistance who are similarly situated. All public assistance recipients are similarly affected by the statutes, rules and regulations challenged herein in that all are by statute, rule and regulation made subject to peremptory *ex parte* termination of their aid. The persons in the class are so numerous as to make joinder impractical; there are common questions of law and fact; plaintiffs' claims are typical of the claims of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. The parties opposing the class have acted or refused to act on grounds generally applicable to the class.

VI

Defendant George K. Wyman is the Commissioner of the Department of Social Services of the State of New York and is charged with statewide administration of the public assistance program and with establishing regulations to carry out the statutory provisions of said program.

Defendant Maurice C. Hunt is Acting Commissioner of the Department of Social Services of the City of New York and is responsible for administering the public assistance program in the City of New York.

Defendants Hugh R. Jones, as Chairman of the State Board of Social Welfare, and Mrs. Omar Adams, Dorothy I. Height, Richard G. Kimmerer, John M. Galbraith, Edward J. Johannes, Jr., Arthur G. Hopkins, Mrs. Monica M. McConville, John P. Hale, Mrs. Alexander E. Holstein, Jr., Frederick A. Klingenstein, George F. Berlinger, Theodore C. Jackson, Jose Lopez, and David Bernstein, as members of the State Board of Social Welfare, are responsible for the promulgation of rules governing the policies and conduct of the Department of Social Services of the State of New York.

VII

The aforesaid public assistance programs created by the New York Social Services law provide financial aid to certain needy persons. Persons who meet the statutory criteria receive financial aid as a matter of statutory entitlement.

VIII

At all times relevant hereto the State of New York and defendants, in order to receive federal funds for the Aid to Families with Dependent Children and Aid to the Aged, Blind, and Disabled programs, have been required by the Social Security Act, Title 42 U.S.C. Sec. 301 *et seq.*, to have formulated a "state plan" for said programs in conformity with the provisions of the Act and the United States Constitution. The Social Security Act, as interpreted by regulations of the United States Department of Health, Education and Welfare, requires that a "state plan" provide for granting an opportunity for a fair hearing before the State agency to any individual aggrieved by an action of a local Department of Social Services.

IX

1. Plaintiff John Kelly is twenty-nine years old and was a recipient of Home Relief in the amount of $80.05 semi-monthly from August, 1967, until January 1, 1968.

2. Plaintiff Kelly was the victim of a hit and run accident in June, 1966, which resulted in serious injury, repeated hospitalization and inability to work.

3. On December 16, 1967, plaintiff Kelly was ordered by his caseworker to move out of the Broadway Central Hotel in which he was then residing and in which he desired to reside and into the Barbara Hotel which charged equal rates but which Mr. Kelly knew to be inhabited by drug addicts and drunkards.

4. Plaintiff Kelly moved into the Barbara Hotel as a result of his caseworker's order, but moved out of this hotel within a short time since he considered it a serious threat to his health and safety. Mr. Kelly moved into the apartment of a friend.

5. On January 8, 1968, planitiff Kelly was informed by the hotel desk clerk at the Barbara Hotel where he received his mail that Mr. Kelly's caseworker had terminated his case and had instructed the clerk to return a check which was mailed to Mr. Kelly for a winter coat which the Department had previously decided Mr. Kelly required.

6. Plaintiff Kelly did not receive his assistance check due January 16, 1968.

7. Plaintiff Kelly attempted to visit his caseworker at the Gramercy Welfare Center, 110 East 28th Street, New York, N.Y. on January 8 and January 16, 1968, and on both occasions was refused an interview.

8. Plaintiff Kelly was informed on both occasions that his case had been terminated because he had violated his caseworker's instructions to move into the Barbara Hotel and remain there or suffer immediate termination of his case.

9. On January 23, 1968, a social worker at Mobilization for Youth, Inc. telephoned the Gramercy Welfare Center and was informed that Mr. Kelly's case had been terminated. Her efforts to re-open Mr. Kelly's case were ineffective.

10. Plaintiff Kelly has no assets, no means of support and remains unable to work pending further surgery which was occasioned by his 1966 automobile accident. Since his termination Mr. Kelly has been living on the charity of his friends.

X

1. Plaintiff Randolph Young is 40 years old. Until his case was closed on January 12, 1968, he received Home Relief assistance in the amount of $57.00 semi-monthly. He has been on public assistance intermittently since 1957.

2. Plaintiff Young is in bad health and has frequently been hospitalized.

3. His most recent hospitalization ended January 8, 1968. While in the hospital his public assistance case was on "Hospital Suspension" and he was not receiving assistance although his case was not closed.

4. After leaving the hospital on January 8, 1968, Mr. Young received a grant of approximately $20.00 for one week's food and rent money. Shortly afterwards he was beaten up and robbed; the money which was taken was re-

placed by the New York City Department of Social Services. During this time Mr. Young was looking for a job; upon obtaining a job he was advanced $5.00 employment agency fee plus carfare and lunch money by the New York City Department of Social Services. Due to his ill health he was not able to keep the job he had obtained since it required heavy labor.

5. On January 12, 1968 he was informed in a telephone conversation with his caseworker that his case had been closed and that he would not receive further public assistance. He was informed that his case had been closed for mis-management of funds.

6. On January 25, 1968 an attorney from Mobilization For Youth, Inc. spoke to Mr. Young's caseworker and was informed that the case had been closed for mis-management of funds and that there was nothing further that the Department of Social Services would do for Mr. Young.

7. Mr. Young presently has no assets whatsoever and is living on such money as he can borrow from friends.

XI

1. Plaintiff Juan De Jesus was a recipient of Home Relief assistance in the amount of $56.80 semi-monthly until January 1, 1968.

2. Plaintiff De Jesus is currently an out-patient at Bellevue Hospital where he is being treated for a physical illness which prevents him from working.

3. Plaintiff De Jesus did not receive his public assistance check which was due January 3, 1968. He was given no advance notice that this check would not be forthcoming.

4. Plaintiff De Jesus contacted his caseworker and was informed that his termination was the result of the fact that he had failed personally to produce his previous employer to verify past part-time employment; that he drank and that he took drugs.

5. Mr. De Jesus had previously presented written verification of his past employment; he could not produce his employer personally since the employer had retired and had moved out of the City of New York. Mr. De Jesus neither drinks nor takes drugs.

6. A telephone call by a law clerk at Mobilization For Youth, Inc., to the Gramercy Welfare Center on January 8, 1968, and a letter from a Mobilization For Youth staff attorney to the Administrator of the Welfare Center have failed to gain either reinstatement to public assistance or a statement of grounds for ineligibility.

7. Plaintiff De Jesus is totally without means of support and has no family. He received temporary shelter from a friend who is himself a recipient of public assistance, but at present is without shelter or financial assets.

XII

1. Plaintiff Pearl McKinney is a 37 year old recipient of public assistance in the AFDC category on behalf of herself and four of her five children. Until January 16, 1968 she regularly received $155 semi-monthly from the New York City Department of Social Services.

2. In July or August, 1967, Mrs. McKinney's eldest son, Marvin, age 19, was removed from her budget on the ground that he was now competent to care for himself. He continued to live in Mrs. McKinney's home, but did not subsequently receive any public assistance.

3. In approximately November or December, 1967, Mrs. McKinney's caseworker requested during a home visit and by letter and telephone that Marvin discuss with her his financial and earning situation. In response, Marvin made a visit to the Gramercy Welfare Center in November or December and discussed his earnings with Mrs. McKinney's caseworker. On information and belief, at that time he showed Mrs. McKinney's caseworker a statement of his earnings.

4. At a fair hearing on December 26, 1967, Mrs. McKinney's caseworker again asked Mrs. McKinney about Marvin's earnings and requested a written statement of his earnings. As a result of this request Mrs. McKinney obtained a copy of a statement of earnings for Marvin which she brought to her attorney at Mobilization For Youth, Inc., on January 15, 1968.

5. By Certified Letter dated January 17, 1968, Stephen Wizner, Esq., of Mobilization For Youth, Inc., forwarded to Mrs. McKinney's caseworker at the Gramercy Welfare Center a copy of Marvin's statement of earnings. A return receipt showing delivery to the Gramercy Welfare Center was received by Mr. Wizner in response to this letter.

6. Marvin, although living in Mrs. McKinney's house, does not contribute any of his net earnings of $55.41 weekly to Mrs. McKinney's household. Marvin is shortly to be married and will thereupon move out of Mrs. McKinney's house; he is saving his money for that event. Further, it was the belief of Mrs. McKinney and her attorney that Marvin was not a legally responsible relative of Mrs. McKinney's under the relevant provisions of law. All of the above facts, as well as the opinion on the law were commu-

nicated to Mrs. McKinney's caseworker in Mr. Wizner's letter of January 17, 1968.

7. On January 26, 1968, Mrs. McKinney received a letter from her caseworker stating that her grant of public assistance had been suspended for "failure to get to us information concerning Marvin's employment." The date of suspension was January 23, 1968.

8. On information and belief it was improper as a matter of law to credit any significant amount of Marvin's income as income to Mrs. McKinney's household; further, that even if the entire amount of Marvin's income were attributed to Mrs. McKinney, she would still be entitled to substantial public assistance; further that it would not be proper to suspend Mrs. McKinney's entire grant of public assistance, based upon any conclusion which can be drawn from the existence of Marvin's income.

9. Mrs. McKinney presently has absolutely no financial resources. She has expended all of her January 16, 1968 check for food and other necessities for herself and her four children and is totally dependent upon receipt of her February 1, 1968 public assistance grant to provide food for herself and her four children.

XIII

1. Plaintiff Pearl Frye is the mother of eight children ranging in age from 3 years to 15 years. Until December 1, 1967, she was the recipient of public assistance in the AFDC category in the amount of $126.00 semimonthly.

2. Mrs. Frye has the rent-free use of a house provided to her by the father of some of her children, who is not

her husband. Therefore her regular budget did not include a grant for rent.

3. The house is owned jointly by the father of her children "and his wife, Minnie". Mrs. Frye is not named Minnie and is not the wife of the owner of the house. Mrs. Frye has no financial interest in the house and she has so informed the Department of Social Services.

4. Mrs. Frye received her last regular public assistance check on December 1, 1967. Just prior to December 16, 1967, the expected date of her next check, she received notice from the Department of Social Services stating that she was being suspended for "non-cooperation" and specifically for failure to keep an appointment to explain to the Department of Social Services the ownership of the house in which she lives.

5. At about the time that her case was closed, she received two grants of public assistance to enable her to meet her needs for particular items of clothing and household furniture. These grants had previously been determined as necessary by the Department of Social Services. After the Department ceased to send her regular funds it became necessary for her to expend one of these grants, which had been given to her for necessary household items, on food for herself and her children. She was also given surplus food commodities by neighbors who were themselves on public assistance.

6. In December, 1967, and January Mrs. Frye repeatedly spoke with her Department of Social Services caseworker, a Mr. Clark, and other employees of the Department about the closing of her case. She was informed that if she would bring the father of the Children into the De-

partment of Social Services to discuss the ownership of the house that the Department would reopen her case. Mrs. Frye did as she was ordered, but the Department has nevertheless refused to reopen the case.

7. After closing her case, Mrs. Frye's caseworker told her that she should get a job and put her children in a day care center. As a result of this, Mrs. Frye went to the South Jamaica Houses Day Care Center; she was there told that she had too many children for them to handle and that she should obtain public assistance. She was referred to a social worker. When she attempted to obtain employment, she was told by potential employees that she belonged at home with her children.

8. Mrs. Frye met with Miss Marilyn Becker, a social worker at the Queens Hospital Neighborhood Health Center in the South Jamaica Houses, in the first week of January, 1968. Miss Becker made numerous telephone calls on behalf of Mrs. Frye and made a personal visit to the Welfare Center with her.

9. As a result of the social worker's efforts, Mrs. Frye received a grant of $135 for food on January 19, 1968. The grant which Mrs. Frye received for food was of an emergency nature and was produced solely as a result of the vigorous efforts of an outside social worker. Mrs. Frye is not now on a regular budget and there is no reason to believe that this grant will be repeated.

10. Prior to being terminated from public assistance, Mrs. Frye had made a request for a Fair Hearing to determine the propriety of the Department of Social Services' failure to provide her with adequate grants for necessary clothing and household furnishings. This hearing was

scheduled for December 7, 1967. At that time it was adjourned for further investigation and, on information and belief, to enable Mrs. Frye to obtain an attorney.

11. The original adjourned hearing was rescheduled and held on January 15, 1968. At that time Mrs. Frye's attorney attempted to raise the issue of the closing of her case. Objection was made by the attorney for the Department of Social Services on the grounds that the original request for a Fair Hearing had not included reference to this issue. This objection was sustained by the State's Hearing Examiner and Mrs. Frye's attorney was not allowed to raise the issue of the closing.

12. The original request for Mrs. Frye's Fair Hearing was made prior to the time that her case was suspended; the fact of suspension had been known to the Department of Social Services at least since the middle of December 1967.

13. As a result of the Hearing Examiner's decision, a letter requesting a new Fair Hearing on the grounds of termination was mailed to the State on January 16, 1968. No hearing has yet been scheduled.

14. Mrs. Frye is in very bad health and is under continuous doctor's care. It may shortly be necessary for her to enter the hospital for a lengthy and arduous series of diagnostic tests. On January 25, 1968, Mrs. Frye was instructed to undertake cancer tests at the hospital. On January 28, 1968 she returned to the hospital for medical care for an ear infection. She has a stomach disorder apparently resulting from nervousness which has grown worse during the great hardship of the last two months.

15. The father of some of Mrs. Frye's children has in the past sent her $15.00 weekly for the children. However, he is presently unemployed and has not been making such contributions regularly. She has received a total of $30.00 from him in the last six weeks.

16. Mrs. Frye currently has approximately $40.00 to support and maintain herself and her eight children. She has no other financial assets and no possibility of obtaining any.

XIV

1. Plaintiff Altagracia Guzman is a 29 year old recipient of public assistance in the AFDC category. She regularly receives $85 semi-monthly on behalf of herself and her four children, who range in age from 1 month to 9 years. She has received public assistance for a period of between one and two years.

2. Mrs. Guzman is married but is separated from her husband. Her husband earns a gross wage of $87.55 weekly. From this he regularly makes a voluntary contribution of $20.00 weekly to Mrs. Guzman for the children. In addition he buys presents and furniture for the household and acts as a father to the children. He does not live with Mrs. Guzman.

3. For some time the Department of Social Services has been attempting to compel Mrs. Guzman to sue her husband for support. Mrs. Guzman has consistently been unwilling to do this since she believes that her husband is now supplying her with support and aid in excess of the amount that a court would order; further, that his availability to the children as a father would be diminished if his relationship to the family were controlled by a court order. She so advised the Department of Social Services.

4. After Mrs. Guzman insisted that she would not be a part of a suit against her husband the Department of Social Services determined that they would sue her husband themselves pursuant to the authority of Sections 101 and 102 of the New York Social Services Law.

5. After so deciding the Department of Social Services endeavored to compel Mrs. Guzman to sign a document authorizing the court to direct that any support payment resulting from suit by the Department be made directly to the Department.

6. On information and belief Sections 101 and 102 of the New York Social Services Law empower the Department of Social Services to sue a father for support and that such proceeding does not require the assistance, cooperation or permission of the mother of the children involved.

7. On at least three separate occasions in January 1968 representatives of the Department called Mrs. Guzman on the telephone and informed her that if she did not sign the paper they had given her they would close her case.

8. On January 10, 1968 Mrs. Guzman consulted an attorney at Mobilization for Youth, Inc. who advised her that she could not prevent the Department from suing her husband but that the relevant provisions of the Social Services Law did not require her assistance or cooperation. She was further advised that the paper given to her was intended for her benefit but that she was not required by law to sign it. She determined that she would not sign the paper.

9. As recently as January 25, 1968 Mrs. Guzman spoke to her unit supervisor at the Department of Social Serv-

ices and was told that if she did not sign the paper immediately her case would be closed.

10. On information and belief on January 10, January 23 and January 25, 1968, Mrs. Guzman's attorney at Mobilization for Youth, Inc., spoke with Mrs. Guzman's case supervisor or unit supervisor at the Gramercy Welfare Center. On each such occasion he expressed his opinion that the Department did not require the assistance of Mrs. Guzman in any way in order to sue her husband. On each such occasion he was informed that it was Departmental policy not to sue in the absence of a signed copy of the paper given to Mrs. Guzman, and that if he did not sign this paper her case would be closed.

11. On information and belief in his conversation with the supervisor on January 25, 1968, Mrs. Guzman's attorney was told that if Mrs. Guzman's paper was not signed her case would be closed around February 1, 1968.

12. On information and belief Mrs. Guzman is in imminent danger of termination by the Department of Social Services based upon a policy of the Department which has no support at law and indeed is contrary to the statutes of New York State.

13. If Mrs. Guzman's case is terminated she will be completely unable to support herself and her four children or to provide any of the necessities of existence.

XV

Sections 213(2), 304, 325 and 353(2) of the New York Social Services Law, and 18 N.Y.C.R.R. Section 356.4 as in effect and as amended by 18 N.Y.C.R.R. Section 82.2-82.23, effective March 1, 1968, prescribing the hearing pro-

cedure in the public assistance program, and Sections 214, 304(6), 325 and 350(2)(b) and 18 N.Y.C.R.R. 351.22 prescribing the manner of termination or suspension of aid in the public assistance program, on their face, and as interpreted and applied to plaintiffs and members of their class, deprive the plaintiffs of the right of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and, to the extent applicable, of the "Fair Hearing" guaranteed by the Social Security Act in that said statutes and the regulations adopted in enforcement thereof authorize and require effective action terminating and suspending financial aid prior to the granting of reasonable notice and opportunity for a hearing which meets due process standards. The termination and withdrawal of financial aid may, under the present regulations, extend for a period of several months before a hearing is held and a decision is rendered, even though plaintiffs had been receiving such aid and are in vital need of such aid for food, shelter and medical care and even though plaintiffs are prepared to prove that they are and have been eligible. Such deprivation is contrary to the purpose of the Social Security Act.

XVI

Plaintiffs have no adequate remedy at law and defendants will continue to cause and threaten to cause irreparable injury to plaintiffs unless enjoined by this Court. Plaintiffs Kelly, Young and De Jesus will not be afforded any administrative hearing since they received aid through the Home Relief program. Plaintiff Frye is awaiting the hearing she has requested. Plaintiff McKinney only received her notice of termination on Friday, January 26.

XVII

Plaintiffs have no adequate resources with which to support themselves and their families in the absence of their public assistance grants.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated, that this Court:

1. Assume jurisdiction of this cause and convene a three-judge Court pursuant to Title 28 U.S.C. §2281.

2. Enter a temporary restraining order and a preliminary injunction ordering the defendants to refrain from

> 1. refusing to pay the named plaintiffs herein their regular public assistance grants and
>
> 2. terminating aid to any recipient of public assistance without giving advance written notice stating the reasons for such action and without affording such recipient an opportunity for a hearing prior to withdrawal of aid.

3. Enter a declaratory judgment pursuant to Title 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that Sections 213(2), 214, 304, 325, 350(2)(b) and 353(2) of the New York Social Service Law and related provisions, and the regulations and rules issued pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, insofar as they authorize and require termination or suspension of public assistance prior to granting reasonable notice and opportunity for a hearing meeting due process standards.

4. Enter a preliminary and permanent injunction restraining the defendants, their successors in office, agents

and employees from terminating or suspending the aid of any public assistance recipient prior to the granting of reasonable and adequate notice and opportunity for a hearing which satisfies the standards of due process of law.

5. Allow plaintiffs their costs herein, grant them and all others similarly situated such additional or alternative relief including payment of all monies wrongfully withheld, as the Court may deem to be just and appropriate.

Respectfully submitted,

HAROLD J. ROTHWAX

HAROLD J. ROTHWAX, Esq.
Attorney for Plaintiffs Kelly, Young, DeJesus, McKinney and Guzman

DAVID A. DIAMOND, Esq.
STEPHEN WIZNER, Esq.
Of Counsel

PETER H. DARROW
On the Brief

MARY B. TARCHER, Esq.
Attorney for Plaintiff Frye

MORT COHEN, Esq.
LOUISE GRUNER GANS, Esq.
Of Counsel

MARTIN GARBUS

MARTIN GARBUS, Esq.
Attorney for Plaintiffs Roger Baldwin Foundation of the American Civil Liberties Union

Of Counsel
BRIAN GLICK, Esq.
HENRY A. FREEDMAN, Esq.

(Sworn to January 26, 1968.)

Affidavit of Stephen Wizner in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

STEPHEN WIZNER, being duly sworn, deposes and says:

1. That I reside at 640 West End Avenue, New York, New York.

2. That I am an attorney admitted to practice in the State of New York, First Judicial Department, and before the United States District Court and United States Court of Appeals for the District of Columbia.

3. That from June, 1966, to August, 1967, I was employed as a litigation attorney at the Center on Social Welfare Policy and Law, Columbia University School of Social Work, and in that capacity had extensive experience in representation of welfare recipients, both on an administrative hearing level and in state and federal litigation.

4. That I am currently employed as an attorney in the Legal Unit of Mobilization For Youth, Inc., 320 East 3rd Street, New York, New York.

5. That in this capacity I have represented Mrs. Pearl McKinney as her attorney from August 7, 1967, to the present.

Affidavit of Stephen Wizner

6. That the major part of my legal representation of Mrs. McKinney has consisted of assisting her in problems which she has had with the New York City Department of Social Services.

7. That in May, 1967 the rent for Mrs. McKinney's apartment in the Lillian Wald Houses of the New York City Housing Authority was increased from $66.80 per month to $81.80 per month.

8. That the New York City Department of Social Services was at that time, and has been at all times relevant to this action, obligated to pay the rent of Mrs. McKinney, and was therefore obligated to increase Mrs. McKinney's grant for rent to reflect her increased rental payments.

9. That the Department did not provide that increase until a fair hearing was held on November 14, 1967, and as a result Mrs. McKinney was served with eviction petitions dated August 23, 1967, and September 11, 1967, and a notice to vacate dated October, 1967, all for non-payment of the increased amount of rent.

10. That it was only because of my appearance in Landlord-Tenant Court, and my intercession with the manager of the Lillian Wald Housing Project and with the attorney for the New York City Housing Authority, on behalf of Mrs. McKinney that she and her children were not evicted from their apartment.

11. That on numerous occasions during August, September, and October of 1967 I communicated with the Department of Social Services by telephone and letter in an attempt to persuade the Department to increase Mrs. McKinney's rent allowance and to furnish her a special grant to cover the back rent which she owed as a result of the

rent increase. My efforts were unsuccessful, despite the fact that the Department's obligation to comply with my requests was clear as a matter of law.

12. That on October 23, 1967, the date originally scheduled for the fair hearing, representatives of the Department were unable to advise the presiding Referee whether the Department intended to comply with Mrs. McKinney's requests because the Department had failed to carry out an investigation of the matters involved in Mrs. McKinney's request for a fair hearing, despite the fact that all issues submitted by Mrs. McKinney had been brought to the attention of the Department, both by myself and by Mrs. McKinney, on numerous occasions during August, September, and October of 1967.

13. That as a result of the Department's failure to prepare for the hearing, the Referee adjourned the hearing and ordered the Department to prepare a report to be submitted to him and to the attorneys for the respective parties.

14. That on November 14, 1967, Mrs. McKinney's hearing was resumed, and at the outset of the hearing, without in any manner contesting the issue, the representatives of the Department announced that Mrs. McKinney's recurring rent allowance would be increased to reflect the increase in rent, and that she would receive a special grant to cover the back rent which she owed as a result of the rent increase. No explanation was offered for the Department's arbitrary actions, either to Mrs. McKinney or to the Referee.

15. That at the same hearing, again without in any manner contesting the issues, the representatives of the Department announced that a special grant had been au-

thorized to Mrs. McKinney for essential articles of clothing and household items which had been repeatedly requested, both by myself and by Mrs. McKinney, during August, September, and October of 1967.

16. That the Referee presiding at the hearing on November 14, 1967, adjourned Mrs. McKinney's hearing again, on the ground that he had not been the Referee presiding on the date originally scheduled for the hearing and that that Referee should hear and decide any issues remaining to be resolved.

17. That on December 26, 1967, Mrs. McKinney's hearing was resumed before a third Referee. The hearing was again adjourned to permit the Department to carry out additional investigation of still unresolved issues relating to Mrs. McKinney's need for certain essential household items.

18. That I am confident that when the hearing is resumed for the fourth time the Department will concede these issues just as it has conceded all other issues raised by Mrs. McKinney's original request for a fair hearing dated September 14, 1967.

19. That on information and belief during November or December of 1967 Mrs. McKinney's caseworker from the Department of Social Services requested that Mrs. McKinney's 19 year old son, Marvin, who had previously been removed from her budget but continued to live in the home, discuss his earnings with the caseworker.

20. That on information and belief, thereafter, during November or December of 1967, Marvin visited the Gramercy Welfare Center of the Department of Social Services

and discussed his earnings with Mrs. McKinney's caseworker, and at that time he showed the caseworker a statement of his earnings.

21. That during the hearing held on December 26, 1967, representatives of the Department again asked Mrs. McKinney about her son's earnings.

22. That on January 15, 1968, Mrs. McKinney brought to my office a copy of a weekly statement of earnings which her son had obtained from his employer.

23. That by certified letter dated January 17, 1968, I forwarded this document to Mrs. McKinney's caseworker at the Gramercy Welfare Center. A return receipt signed by the Center acknowledging receipt of my letter on January 18, 1968, was returned to me by the post office. Copies of the aforesaid letter and receipt are annexed hereto.

24. That on information and belief Mrs. McKinney's son has never contributed any of his weekly net earnings of $55.41 to his mother's household expenses.

25. That on information and belief Mrs. McKinney's son plans to be married in the immediate future and will thereupon move out of his mother's house; he is saving his money for that event.

26. That under relevant New York statutes and regulations Mrs. McKinney's son is not a legally responsible relative and is therefore not required to contribute to her support.

27. That all of the foregoing facts were communicated to Mrs. McKinney's caseworker by me orally at the hear-

ing on December 26, 1967, and in my letter of January 17, 1968.

28. That on January 26, 1968, Mrs. McKinney received a letter from her caseworker stating that the recurring grant of public assistance for herself and her children had been suspended as of January 23, 1968, for "failure to get to us information concerning Marvin's employment."

29. That this arbitrary and erroneous action on the part of the Department of Social Services was without any justification in fact or law.

30. That it is my belief that Mrs. McKinney will be restored to recipient status at a fair hearing.

31. That it is my further belief that the Department of Social Services never at any time seriously contested any of Mrs. McKinney's requests, and that the six month delay between the time of the rent increase and the payment of the increased rent by the Department was occasioned primarily by bureaucratic rigidity under which the Department functions.

32. That the Department of Social Services failed to give serious consideration to the merits of Mrs. McKinney's requests until compelled to do so by appearance at a fair hearing, an administrative appellate proceeding.

33. That the same failure to conform to proper behavior as required by law is present in the Department's suspension of Mrs. McKinney as was present in the Department's failure to increase her rent grant.

34. That Mrs. McKinney now faces serious economic hardship solely because the Department is not required to

submit the propriety of its most critical decision, the decision to suspend a recipient, to a neutral tribunal prior to implementing this decision.

35. That the present procedure of review subsequent to suspension or termination results in serious damage to welfare recipients which would be prevented by a requirement of hearings prior to suspension, and the existing procedure is solely responsible for the present suspension of Mrs. McKinney and her children.

Stephen Wizner

(Sworn to January 28, 1968.)

Exhibit Annexed to Foregoing Affidavit

Letter Dated January 17, 1968

January 17, 1968

Miss Cottrell, Investigator
Gramercy Welfare Center
110 East 28th Street
New York, New York

Re: Pearl McKinney
40 Avenue D
New York, New York
ADC 2387410 02-5

Dear Miss Cottrell:

With reference to the above-captioned matter, enclosed please find an estimate for a wringer-type washing machine from Sears, Roebuck and Co.; an estimate for reupholstering of the kitchen chairs; and a statement of earnings for Mrs. McKinney's son Marvin.

You will note that Marvin's take-home pay is $55.41. He has never contributed anything to the household expenses and is not a legally responsible relative. Moreover, he is planning to get married within the next week and should be out of the house no later than January 26, 1968.

Yours truly,

Stephen Wizner
Staff Attorney

SW/ml

Affidavit of Marilyn Becker in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MARILYN BECKER, being duly sworn, deposes and says:

I am a psychiatrist social worker at the Neighborhood Help Center of Queens General Hospital, 106-56 160th Street, South Jamaica, Queens, New York.

On January 9, 1968, Pearl Frye came to the Neighborhood Help Center. She told me that she needed food for her eight children and help in her difficulties with the Department of Welfare; she had been referred to our clinic by the Jamaica Day Care Center.

Pearl Frye told me that she and the children had been receiving public assistance until the middle of December, 1967, at which time she and her eight children had been summarily "cut off" from further assistance. She did not really understand the reason for the suspension of the Welfare payments, but mentioned something about a mortgage and a missed appointment.

Pearl Frye told me that during the past few weeks she and her children had gone hungry and that they had been living on peanut butter and jelly sandwiches and rice. She had desperately tried to find a job but had been unsuccessful.

Affidavit of Marilyn Becker

I immediately telephoned Miss Frye's caseworker, Mr. Clark, and asked that the case be reopened. Mr. Clark told me that this could not be done because there were questions about Pearl Frye's eligibility and because her "boyfriend" was living with her. I asked Mr. Clark whether he had any proof of the latter charge, but he stated that he did not have to answer this question.

The next day, January 10, 1968, I accompanied Miss Frye to her Welfare Center to see Mr. Clark in person in order to apply for emergency assistance for her. Mr. Clark denied the request for emergency assistance. He again mentioned her possible ineligibility and explained that Miss Frye had been "technically suspended" for failure to keep two appointments with the Central Office's Resources Department to which she was supposed to explain the ownership of the house where she was living rent free. Mr. Clark again referred to Miss Frye's "boyfriend" and suggested that she ought to get money from him. Mr. Clark was referring to Mr. Frye, father of six of Miss Frye's children. I explained to Mr. Clark that Mr. Frye was unemployed and could not help. Mr. Clark repeated that because of the technical suspension, no emergency money for food could be allowed. He could only suggest that Miss Frye get a job, or in the last resort that she leave her home and move with the children to a Women's Shelter.

I then spoke with Mrs. Leschnauer, an Assistant Administrator for the Welfare Center, but she only affirmed Mr. Clark's position that because of the "technical suspension", no emergency money for food could be given to Miss Frye.

After leaving the Welfare Center, I telephoned the Central Office's Information and Adjustment Bureau and told them of Miss Frye's situation. The woman I spoke to told me that she would check into the matter, and later

in the day I received a call from a Miss Jones who again informed me that in the case of a "technical suspension," no emergency assistance could be provided even for food. At my insistence, Miss Jones agreed to check further on this question with her supervisor. The next day, January 11, 1968, I was telephoned by the Central Office and informed that a check for one month's supply of food would be issued to Miss Frye.

I understand that the actual check for $135 did not reach Miss Frye until January 19, 1968, eight days after I had been told that it was being issued.

Marilyn Becker

(Sworn to January 29, 1968.)

Affidavit of Peter H. Darrow in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

PETER H. DARROW, being duly sworn deposes and says:

1. That I reside at 135 Ridge Street, New York, New York.

2. That I am presently employed as a VISTA Volunteer assigned to Mobilization For Youth Legal Services Unit, 320 East 3rd Street, New York, New York as a staff attorney.

3. That I am a graduate of the University of Chicago Law School and that, although not yet admitted to practice, I am permitted to engage in limited representations of clients under New York Penal Law Section 270 and by order of the New York Appellate Division upon the application of Mobilization For Youth, Inc., March 9, 1967.

4. That from September, 1967, to the present I have represented approximately one hundred Welfare recipients in their so-called "fair hearings" contesting the failure of the New York City Department of Social Services to issue grants to provide for adequate shelter, clothing, home furnishings, and medical care.

5. That since September, 1967, I have assisted numerous other recipients in their day to day dealings with their caseworkers and their caseworkers' supervisors. Usually, such representation has been merely by telephone but occasionally it has involved lengthy conferences involving extensive examination of client's usually confidential case records to negotiate the issues for which termination of the recipient is threatened or has occurred.

6. That in the majority of fair hearings in which I have appeared as representative for the recipient, the New York City Department of Social Services has not contested either the recipient's contentions of law or fact, but has merely submitted evidence at the hearing that all or substantially all of the recipient's requests have been met by a grant issued within a week or less of the hearing date.

7. That I have several times negotiated at length with the caseworkers and supervisors over the termination of recipients. In every case, the decision to terminate has been made by the caseworker and supervisor based either on improper conclusions as to the requirements of the statutes and regulations or on an incomplete examination of evidence.

8. That I have represented two recipients who were terminated for forgery of welfare checks. One was restored after my examination of the Department's hand writing expert revealed that the forged signature was not that of the recipient; the other was restored because no attempts to examine the signatures had ever been made. A third recipient was terminated for failure to respond to letters from his caseworker without any effort to ascertain either delivery or actual receipt of those letters. He too was restored.

9. That in my opinion, such improper results may be ascribed to malice or incompetence in few cases. Thus, in all three of the above examples the caseworkers involved sought to be "fair". In my opinion, such results are inevitable if Social Service caseworkers are required to function both as investigator and decision-maker.

10. That, in my opinion, only an impartial fact-finding tribunal is able to make just findings from sorting caseworkers' suspicions from valid and supportable allegations.

11. That my experience indicates to me that hearings are effective in guaranteeing fair and impartial determinations in the administration of grants. That my experience in negotiating the issues leading to termination indicates to be that the availability of a hearing before termination would guarantee more impartial determinations of those issues.

12. That recipients who are terminated under present regulations are forced to suffer irreparable harm since they may only begin to process their appeal after termination. It is often several months until a determination of the appeal is made. During the entire intervening period the recipient is left without funds.

13. That plaintiffs Kelly, Young, and DeJesus are presently suffering such serious and irreparable harm as they pursue their suits in this court.

14. That on Wednesday, January 24, 1968, I was able to assist plaintiff Kelly in obtaining a ten dollar loan from a Mobilization for Youth, Inc. small loan fund. Plaintiff Kelly has informed me that he has no other resources.

15. That on Friday, January 26, 1968, I assisted plaintiff Young in obtaining a one dollar fifty cent loan from the same loan fund which he informed me he would make last the weekend "and until I got put back on."

16. That plaintiff DeJesus visited my office on Friday, January 26, 1968, and, said loan fund being depleted, was turned back into the street with the assurance that we would do our best to have him restored. He left our office without resources to seek shelter and food.

17. That it is the result of the unavailability of a prior hearing that plaintiffs are suffering such irreparable harm.

Peter H. Darrow

(Sworn to January 29, 1968.)

Affidavit of Edward V. Sparer in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

EDWARD V. SPARER, being duly sworn, deposes and says:

1. I am a member of the faculty of the Yale Law School where, among other things, I teach the law of public assistance. I am also a member of the bars of the State of New York and the United States District Court for the Southern and Eastern Districts of New York. I reside at No. 293A, Old Toll Road, Madison, Connecticut. I submit this affidavit in support of Plaintiffs motion for a temporary restraining order, preliminary and permanent injunction prohibiting the defendants from terminating welfare assistance without affording a prior hearing to those who request it.

2. At the present time, and for the past two and one-half years (commencing in September of 1965) I have consulted with counsel or actively participated as counsel in litigation and "fair hearing" procedures for numerous welfare recipients and applicants in various parts of the United States, including New York. During the same period of time I have lectured before numerous groups of lawyers (representing welfare recipients), welfare recipients and welfare caseworkers in many parts of the United States, including New York. In the course of these activities, I have made personal acquaintance and friendship

with welfare recipients and, on this more intimate basis, have come to better understand their fears and problems in dealing with welfare administration.

3. As a consequence of the activities referred to in paragraph (2) above, and of those described in paragraph (4) below, I have seen, again and again, the dire and irreparable effects of the failure to grant administrative "fair hearings" prior to the termination of welfare assistance. In such diverse places as Georgia, North Carolina, New York, Michigan, Mississippi and California, the effects have been the same. Recipients are terminated from assistance they desperately need for their survival and that of their children; they are cast into deep fear, anguish and physical suffering; if they are fortunate enough to be informed of their right to a hearing and obtain assistance in the hearing, they may—and often have—won a determination that their cutoff was illegal. In no case, however, is there a mechanism for making them whole from the anguish and physical suffering caused. Indeed, none can be imagined.

4. (a) I have particular acquaintance with the consequences of the failure of New York State and city welfare (social services) authorities to afford a "fair hearing" prior to the termination of welfare benefits where the recipients disagree with the reasons for termination. In addition to my activities since 1965, referred to in paragraph (2) above, I was—for two years prior to that date—attorney for well over one hundred welfare clients in the City of New York. Additionally, over a period of time, I have acquainted myself with relevant public investigations of the welfare system in New York and statistics concerning its operation.

(b) I have personally represented scores of persons in New York who were terminated or denied welfare assist-

ance without an opportunity for a prior hearing. Of these, I do not recall a *single* case in which public assistance aid was not restored, either as a result of hearing decision or settlement by the local welfare agency prior to the scheduled hearing. I do not recall a *single* one of these cases in which great suffering, mental and physical did not occur as a result of the initial adverse decision. I do have vivid memories of the suffering which was caused. None of my clients were made whole for their suffering.

(c) Even if wrongfully terminated recipients were given an award which, in monetary terms, accounted for all their losses during the period of wrongful termination, such an award could not—of course—remedy the hunger and anguish caused during that period. However, under New York welfare regulations, and the manner in which they are interpreted in practice, recipients are not made whole even for the monetary losses they suffered. Rather, recipients may be made whole, in monetary terms, only for a two month period preceding the month in which the hearing was decided. In addition, there is considerable uncertainty in practice as to whether recipients are confined, in a retroactive award, to provable debts. Thus, for example, if the individual did not incur a provable debt for food, he may not receive a retroactive award for the loss of money spent on food.

(d) It has been a common occurrence, in my experience, for recipients to be denied welfare assistance for thoroughly unclear and vague reasons—such as "lack of cooperation"—or for no stated reason at all. The Moreland Commission Report on Public Welfare in the State of New York (1963) made clear that this phenomenon was by no means confined to New York City. Thus it states (p. 27):

> Similarly, when cases are closed, are reasons given? Again—not always. In one county, for example,

> 35.7 percent of those interviewed claimed they were not told why assistance was cut off, and the case records failed to indicate that the former recipient had been given a reason.

Such recipients, of course, have no fair or real forum to learn and examine the reason for their termination until *after* they are already suffering the painful effects of their termination.

(e) It is also clear from the statistics of the New York State Department of Social Services that my experiences on wrongful decisions corrected after "fair hearing" appeals are made are not especially unique. Thus, for example, during the year 1966, of 427 hearing requests disposed of, 305 resulted in a settlement with the local agency or a decision favorable to claimant and most of the others were discontinued rather than decided adversely. Likewise, claimants achieved favorable results in 117 of 181 hearing requests disposed of in 1965.

(f) It is my belief that it is extremely difficult to obtain financial aid from the voluntary charities in New York City for welfare recipients who have been terminated, pending a decision on their appeal. During the year 1964, for example, the plight of a mother with twelve children who was terminated from all welfare assistance and had no other income was brought to my attention. After arranging for an attorney for this family, I sought to obtain financial assistance from several of the major voluntary charities. I was joined in this effort by a former director of the New York City Social Service Department's Child Welfare Division. Our best efforts failed. I gave my own money to pay the children's food bills for a several week period.

(g) My experience with welfare clients who have been wrongfully terminated or denied assistance has been that their need is *immediate* and that the crisis caused by their termination or denial is *immediate*. As a logical matter, aside from my experience, such immediate needs and crises must follow termination if the termination is wrongful; under the New York welfare system, a wrongful termination necessarily means that the family is in need of aid at the time of termination. For that reason, holding hearings within shorter periods of time after termination (than now occurs) helps a little but does not cure the problem. So long as the hearing is after the termination, rather than before, some large suffering must occur.

5. As a result of my personal experience and interaction with welfare recipients in New York and elsewhere, I have learned that there is great fear upon the part of recipients to disagree with caseworkers even when the recipients are convinced that the caseworkers are wrong. The recipients know that their caseworker and his supervisor can quickly and arbitrarily terminate their aid. The recipients also know that later vindication will not relieve their suffering until after that vindication. For this reason, welfare recipients are in an inherently unequal position vis a vis the agency, accede to demands—such as searches, answer unnecessary and humiliating questions, and generally agree with caseworkers where they think they ought not agree. In my opinion, prior hearings are essential to remedy this degrading situation for millions of our fellow citizens. For this reason, as well as because of those experiences hitherto stated, I have submitted this affidavit.

Edward V. Sparer

(Sworn to January 28, 1968.)

Notice of Motion for Preliminary Injunction, Convening of Three-Judge Court and Class Action Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the defendants:

Please take notice that the plaintiffs will bring on for hearing before the United States District Court in Room 506 of the United States Courthouse, Foley Square, New York, New York, on February 13, 1968 at 10:00 a.m. or as soon thereafter as counsel may be heard a motion seeking the following relief:

1. A preliminary injunction enjoining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from:

(1) refusing to pay the named plaintiffs herein their regular public assistance grants, to wit, semi-monthly payments in the amounts indicated: John Kelly, $80.05; Randolph Young, $57.00; Juan De-Jesus, $56.80; Pearl Frye, $126.00; Pearl McKinney, $155.00; and Altagracia Guzman, $80.00; and

(2) suspending or terminating aid to any recipient of public assistance without giving advance written

notice stating the reason for such action and without affording such recipient an opportunity for a due process hearing prior to withdrawal of aid.

The grounds of this motion, as more fully set forth in the verified complaint filed January 29, 1968, and the annexed affidavits of Henry A. Freedman, dated February 1, 1968; Edward V. Sparer, dated January 28, 1968; Stephen Wizner, dated January 28, 1968; Peter H. Darrow, dated January 29, 1968; and Marilyn Becker, dated January 29, 1968, are that:

a. Plaintiffs and all members of the class are either suffering or threatened with irreparable injury in that they are now, or may at any time be, without means to provide for themselves the basic necessities of food, clothing and shelter.

b. The issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiffs.

c. The statutes and regulations which deny plaintiffs a hearing prior to termination or suspension of public assistance violate plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States.

d. Plaintiffs have no adequate remedy at law.

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary injunction and this cause, in accordance with the provisions of Title 28 United States Code Sections 2281 and 2284.

3. An order determining that this action may properly proceed as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

Notice of Motion

PLEASE TAKE FURTHER NOTICE that opposing affidavits and answering memoranda must be served upon counsel for plaintiffs at least three days before the return day of this motion.

HAROLD J. ROTHWAX, Esq.
Attorney for Plaintiffs
Kelly, Young, DeJesus,
Guzman and McKinney

MARY B. TARCHER, Esq.
Attorney for Plaintiff Frye

MORT COHEN, Esq.
LOUISE GRUNER GANS, Esq.
Of Counsel

MARTIN GARBUS, Esq.
Attorney for Plaintiffs
Roger Baldwin Fund of the
American Civil Liberties
Union

Of Counsel:
BRIAN GLICK, Esq.
HENRY A. FREEDMAN, Esq.

Affidavit of Henry A. Freedman in Support of Foregoing Motion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

HENRY A. FREEDMAN, being duly sworn, deposes and says:

1. I reside at 150 West 96th Street, New York, N.Y. I am an attorney admitted to practice in the State of New York and am of counsel to the attorneys for plaintiffs in this action. I make this affidavit in support of plaintiffs' motion for preliminary injunction, convening of a three-judge court, and class action order.

2. This action for declaratory and injunctive relief challenges the constitutionality of the suspension or termination of public assistance and without prior notice and a due process hearing, as is more fully set forth in the verified complaint and the Memorandum of Points and Authorities submitted together with this motion.

3. Plaintiffs commenced this action on January 29, 1968 by filing a summons and complaint. They thereafter presented Judge Thomas F. Murphy with a proposed Order to Show Cause for a Temporary Restraining Order on the ground that termination or threatened termination of assistance had caused, and was further threatening them with,

immediate and irreparable injury. Counsel for the defendants were notified by counsel for the Plaintiffs and appeared at Judge Murphy's chambers. Judge Murphy did not sign the order, stating:

> "I have refused to sign this order to show cause because no sufficient reason appears in the affds. as required by our Rules."

5. On information and belief, the Department of Social Services of the City of New York has now restored Plaintiffs McKinney and De Jesus to full current, but not retroactive, public assistance benefits, thereby admitting the wrongful nature of the original suspension or termination.

6. On information and belief, Plaintiffs Kelly, Young, and Frye have not been restored to full aid and continue to suffer irreparable injury. Speedy determination of this motion is therefore of the greatest urgency.

7. Plaintiffs have made no other application for this relief other than that stated above.

Henry Freedman

(Sworn to February 1, 1968.)

Notice of Defendants' Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the complaint dated the 29th day of January, 1968, the annexed affidavit of JOEL H. SACHS, and accompanying exhibits, dated the 21st day of February, 1968 and defendants' memorandum of law dated February 21, 1968, the undersigned will move this Court at a Motion Term thereof at Room 506, United States Courthouse, Foley Square, City of New York, on the 5th day of March, 1968 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
February 21, 1968

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Wyman and the New York
State Board of Social
Welfare

To:
MARTIN GARBUS, ESQ.

Affidavit of Joel H. Sachs in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Wyman, Commissioner of the New York State Department of Social Services, Jones, Chairman of the State Board of Social Welfare, Adams, Height, Kimmerer, Galbraith, Johannes, Hopkins, McConville, Hale, Hostein, Klingenstein, Berlinger, Jackson, Lopez and Bernstein, as members of the Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case. I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction, the convening of a three-judge statutory court and a determination that the action may proceed as a class action and in support of defendants' motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted.

This action, commenced by attorneys for the American Civil Liberties Union, Mobilization For Youth and the New York Legal Aid Society is a "test case" challenging the constitutionality of several provisions of the New York Social Welfare Law and the official compilation of Codes, Rules and Regulations of the State of New York. It is one

of a series of actions which have been commenced by these and related organizations throughout the United States attacking state welfare law provisions as to the procedures to be followed when a welfare recipient's assistance is suspended or discontinued.

At the time plaintiffs' action was commenced, defendant concedes that no provision of the New York State Welfare Law gave welfare recipients notification of their suspension or termination prior to such suspension or termination, nor was a hearing authorized to be conducted prior to the date of discontinuance. (However, at that time the law did and still does give any welfare recipient who has been suspended or discontinued or terminated the right to ask for a fair hearing to review his suspension or termination.) After the instant action was commenced, the New York Department of Social Services, after examining plaintiffs' papers and after conferring with the Welfare Departments in the States of California and Mississippi (where similar actions have recently been commenced in the federal courts), the New York State Department of Social Services had determined to amend its regulations concerning the procedure to be followed when a welfare recipient's assistance is discontinued or suspended (as the Welfare Departments in California and Mississippi had done previously), thus giving plaintiffs precisely the relief they requested.

Copies of the new Regulations and Rules of the New York State Department of Social Services are annexed. (See annexed exhibits.) The newly added Section 351.26 of the Official Regulations of the New York State Department of Social Services (Exhibit "A") now provides that before a recipient's welfare payment is discontinued or suspended the recipient is notified in advance of the proposed discontinuance or suspension along with the reasons therefor. The notice advises the recipient that if he so desires he shall be afforded an opportunity to appear for a review of

this determination, with the assistance of an attorney or other representative, at which time he will be afforded an opportunity to present such written or oral evidence and the reasons that the recipient may have to demonstrate why this grant should not be discontinued or suspended. Hence, plaintiffs' claim that welfare payments may be suspended or discontinued without prior notification or hearing no longer has any merit.

In addition, new Rules of the New York State Board of Social Welfare have recently been adopted (see Exhibit "B") which extend the fair hearing provisions to all welfare recipients and streamline the fair hearing requirements. All welfare recipients are now notified of the right to a fair hearing. The hearing is held within ten working days from the date the request is received by the Department in cases involving discontinuance or suspension of assistance. The recipient is notified of his rights to be represented, to testify, to present documentary evidence and to examine opposing witnesses and evidence. After hearing it is required that a decision be issued as promptly as feasible but not later than 12 working days from the close of the hearing.

Taken together the new Regulations and Rules conclusively show that plaintiffs' claim as to the unconstitutionality of the procedures which the New York State Department of Welfare follows when a recipient's aid is suspended or terminated, is utterly without merit. As the new Regulations now provide, recipients are now notified before their assistance is discontinued and have a right to a hearing before the termination date. In addition, the new Rules which provide for a fair hearing after the discontinuance of assistance, provides a second means by which welfare recipients may challenge the determination. As will be more fully set forth in defendants' accompanying memorandum of law, a three-judge statutory court may not be con-

vened unless a substantial constitutional question is presented. In view of the fact that the Rules and Regulations of the New York State Department of Social Services have been drastically revised in order to give plaintiffs the precise relief which they now request, no substantial constitutional question is presented and plaintiffs' motion for the convening of a three-judge statutory court should be denied.

Similarly, plaintiffs' request for a preliminary injunction enjoining the defendants from refusing to pay the named plaintiffs their regular public assistance grants should be denied. I have been informed by Merrill Charlton, Esq., Assistant Attorney in the New York City Department of Social Services that plaintiffs Kelly, DeJesus, McKinney and Frye have been restored to the City of New York Welfare rolls and that plaintiff Guzman had never been removed. Hence, as to these plaintiffs, any request for a preliminary injunction is moot.

Furthermore, plaintiffs' request extending the preliminary injunction to all welfare recipients in the State need not be granted, because as will be more fully set forth in the accompanying memorandum of law, before an injunction may be granted in connection with a motion for a three-judge statutory court, plaintiffs must show irreparable and immediate harm. As previously found by Judge Thomas F. Murphy of this Court (when presented with an order to show cause in this action on January 27, 1968), plaintiffs have failed to show irreparable and immediate harm. Furthermore, to grant the preliminary injunction would be to give plaintiffs the ultimate relief they request without a court ever having passed on the constitutional issues involved.

Finally, for reasons to be more fully set forth in defendants' accompanying memorandum of law, defendant

opposes plaintiffs' motion, that the case proceed as a class action.

WHEREFORE, the defendants respectfully request that plaintiffs' motions for a preliminary injunction, the convening of a three-judge statutory court and a determination that the action may proceed as a class action be denied and it is further requested that defendants' motion to dismiss the complaint be granted.

Joel H. Sachs

(Sworn to February 21, 1968.)

Exhibit A Annexed to Foregoing Affidavit

Newly Added Section 351.26 of Official Regulations of the New York State Department of Social Services

STATE DEPARTMENT OF SERVICES
ALBANY, NEW YORK

Pursuant to the provisions of sections 20 and 24 of the Social Services Law, I, George K. Wyman, Commissioner of Social Services, do hereby amend in part, as hereinafter indicated, section 351.25 and Part 351 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR, effective as of March 1, 1968.

Section 351.25 is hereby amended to read as follows:

> 351.25. Notification of change in grant. The recipient shall be notified of any change in grant. Reasons for the change and necessary information on the assistance plan shall be included in the notification.

Part 351 is hereby amended by adding thereto a new section, to be section 351.26, to read as follows:

> 351.26. Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance, he shall notify the recipient in writing of his intention to do so at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to

appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any, of the employee designated by him to review the proposed

action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office.

Date: February 15, 1968

Signed George K. Wyman
Commissioner

This is to certify that this is the original of an order of the State Department of Social Services made on February 15, 1968 amending in part section 351.25 and Part 351 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR.

Date: February 15, 1968

George K. Wyman
Commissioner

Order to Show Cause

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 864/68

RUBY SHEAFE, *et al.*,

Plaintiffs,

v.

GEORGE K. WYMAN, *et al.*,

Defendants.

Let defendants show cause, in Room 506 of the United States Courthouse, Foley Square, New York, New York, on the 5th day of March, 1968, at 10:00 a.m., or as soon thereafter as counsel may be heard, why an order should not issue or the court take such other action as shall grant the plaintiffs herein the following relief:

1. A preliminary injunction enjoining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from:

   (1) refusing to pay the named plaintiffs herein regular public assistance grants, to wit, semi-monthly payments in the amounts indicated: Ruby Sheafe, $52, and Esther Lett, $72; and

   (2) suspending or terminating aid to any recipient of public assistance without giving advance written notice stating the reason for such

action and without affording such recipient an opportunity for a due process hearing prior to withdrawal of aid.

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary injunction and this cause, in accordance with the provisions of Title 28 United States Code Sections 2281 and 2284.

3. An order determining that this action may properly proceed as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

Let the defendants further show cause why a temporary restraining order pursuant to Title 28 United States Code Section 2284 should not issue restraining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from

(1) refusing to pay the named plaintiffs herein their regular public assistance grants, to wit, semi-monthly payments in the amounts indicated: Ruby Sheafe, $52, and Esther Lett, $72; and

(2) terminating aid to any recipient of public assistance without giving advance written notice stating the reason for such action and without affording such recipient an opportunity for a hearing prior to withdrawal of aid,

pending the hearing and determination of plaintiffs' motion for a preliminary injunction by a three-judge court convened pursuant to Title 28 United States Code Sections 2281 and 2284.

Plaintiffs seek this temporary restraining order, preliminary injunction, and other relief on the grounds that:

1. They are each suffering, or threatened with imminent suffering of, irreparable injury in that they are without means to provide for themselves the basic necessities of food, clothing and shelter and will continue to suffer even greater deprivation until they are restored to full public assistance,

2. The issuance of a temporary restraining order and preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiffs,

3. The statutes and regulations which deny plaintiffs a hearing prior to termination or suspension of public assistance violate plaintiffs' right under the Fourteenth Amendment to the Constitution of the United States, and

4. Plaintiffs have no adequate remedy at law, as set forth more fully in the verified complaint and the affidavits of Richard Kwasnik (two affidavits), Esther Lett, David Gilman, attached hereto, as well as the affidavit of Edward V. Sparer submitted in *Kelly, et al.*, v. *Wyman, et al.*, Civil Action No. 394/68, a copy of which is attached hereto.

IT IS FURTHER ORDERED that service of this Order on defendants on or before 5 P.M. on the 29th day of February, 1968, be deemed sufficient.

IT IS FURTHER ORDERED that service of this order may be made by any of the attorneys for plaintiffs in this action.

Done and ordered at the United
States Courthouse, Foley Square,
New York, New York, this 29th
day of February, 1968, at 4:00 o'clock.

John M. Cannella
United States District Judge

Complaint for Three-Judge Court, Declaratory Judgment, Injunctive Relief

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

I

This is an action for injunctive and declaratory relief and damages authorized by Title 42 U.S.C. 1983 to secure rights, privileges and immunities established by the Fourteenth Amendment to the Constitution of the United States and the Social Security Act, Title 42 U.S.C. 301 *et seq.*, and the regulations promulgated thereunder. Jurisdiction is conferred on this Court by Title 28 U.S.C. 1343(3) and (4) providing for original jurisdiction of this Court in suits authorized by Title 42 U.S.C. 1983; and jurisdiction is further conferred on this Court by 28 U. S. C. 2201 and 2202 relating to declaratory judgments.

II

This is a proper case for determination by a three-judge court pursuant to Title 28 U.S.C. 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing, and implementing Sections 213(2), 214, 304, 325, 350(2)(b), and 353(2) of the New York Social Services Law, Section 351.22 and 356.4 of Volume 18, Official Compilation of Code, Rules and Reg-

ulations of the State of New York (hereafter referred to as 18 N.Y.C.R.R.), Sections 84.2-84.24 of 18 N.Y.C.R.R. promulgated by the New York State Board of Social Welfare to supersede Section 351.22 and 356.4 on March 1, 1968, Sections 351.26 of 18 N.Y.C.R.R. promulgated by Defendant Wyman effective March 1, 1968, and related statutes, rules and regulations, insofar as these statutes and regulations require termination or suspension of financial aid in the form of public assistance [Aid to Families with Dependent Children (AFDC), Aid to the Aged, Blind and Disabled (AABD) and Home Relief (HR)] prior to the granting of adequate notice and opportunity for a hearing which meets due process standards, on the grounds of the invalidity of said statutes and regulations under the Constitution and laws of the United States.

III

This action seeks an injunction and declaratory judgment restraining the enforcement of, and declaring unconstitutional, the aforesaid state statutes and state-wide rules and regulations, on their face and as applied and interpreted by defendants, on the grounds that said statutes, rules and regulations, and actions taken pursuant thereto, deprive plaintiffs of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and, so far as the AFDC and AABD programs are concerned, deprive plaintiffs of the "fair hearing" guaranteed by the Social Security Act, in that said statutes, rules and regulations deny to plaintiffs an opportunity for a hearing which satisfies due process standards prior to termination or suspension of financial aid under the public assistance program.

IV

Plaintiffs Esther Lett and Ruby Sheafe are adult citizens of the United States and residents of the City and State of New York who received public assistance until aid was terminated without a hearing.

V

Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other recipients of public assistance who are similarly situated. All public assistance recipients are similarly affected by the statutes, rules and regulations challenged herein in that all are by statute, rule and regulation made subject to peremptory *ex parte* termination of their aid. The persons in the class are so numerous as to make joinder impractical; there are common questions of law and fact; plaintiffs' claims are typical of the claims of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. The parties opposing the class have acted or refused to act on grounds generally applicable to the class.

VI

Defendant George K. Wyman is the Commissioner of the Department of Social Services of the State of New York and is charged with statewide administration of the public assistance program and with establishing regulations to carry out the statutory provisions of said program.

Defendant Jack R. Goldberg is Commissioner of the Department of Social Services of the City of New York and is responsible for administering the public assistance program in the City of New York.

Defendant members of the State Board of Social Welfare are responsible for the promulgation of rules governing the policies and conduct of the Department of Social Services of the State of New York.

VII

The aforesaid public assistance programs created by the New York Social Services law provide financial aid to certain needy persons. Persons who meet the statutory criteria receive financial aid as a matter of statutory entitlement.

VIII

At all times relevant hereto the State of New York and defendants, in order to receive federal funds for the Aid to Families with Dependent Children and Aid to Aged, Blind, and Disabled programs, have been required by the Social Security Act, Title 42 U.S.C. Sec. 301 *et seq.*, to have formulated a "state plan" for said programs in conformity with the provisions of the Act and the United States Constitution. The Social Security Act, as interpreted by regulations of the United States Department of Health, Education and Welfare, requires that a "state plan" provide for granting an opportunity for a fair hearing before the state agency to any individual aggrieved by an action of a local Department of Social Services.

IX

1. Plaintiff Ruby Sheafe is thirty-five years old and was a recipient of Home Relief assistance in the amount of approximately $52.00 semi-monthly from September, 1966 to January 8th, 1968.

2. Plaintiff received a semi-monthly grant computed on a supplemental basis since she worked part time.

3. On January 8, 1968 Plaintiff visited her case worker at the Gramercy Welfare Center to discuss with her worker the computation of her semi-monthly grant. The worker told the Plaintiff that Plaintiff must give the worker the name and address of a former employer of Plaintiff, for she wished to contact him. Plaintiff told the worker that she had already been investigated and found to be eligible for Public Assistance. Plaintiff inquired as to the reason for the reinvestigation of her eligibility. The worker refused to give Plaintiff a reason and insisted that the plaintiff disclose the name and address and telephone number of her former employer. Plaintiff refused to divulge the information without first being informed why this information was being requested. Plaintiff informed the worker that she would be more than willing to allow the Department to contact her present employer, for whom she has been working since being accepted for public assistance. The worker then informed Plaintiff that her case was closed and walked away.

4. Plaintiff did not receive her assistance check due January 16, 1968.

5. Plaintiff received a "Notice of Discontinuance" dated January 17, 1968 (see attached Exhibit A) informing Plaintiff that her case was closed for "refusal to permit visits (collateral)."

6. On January 26, 1968 Plaintiff requested a fair hearing to review the reasons for her aid being discontinued. No hearing has yet been scheduled.

7. Plaintiff attempted to visit her case worker on February 5, and 13, and remained in the center all day without being interviewed.

X

1. Plaintiff Esther Lett is 45 years old and was a recipient of public assistance in the A.D.C. category on behalf of herself and four minor nieces and nephews.* Until February 1, 1968, she regularly received $72.00 semi-monthly from the New York City Department of Social Services.

2. Mrs. Lett last received her regular public assistance check on February 1, 1968. On February 11, 1968 she received a notice from the Department of Social Services stating that aid was being discontinued for "Failure to disclose assets." Attached was a letter stating that the Department has been advised by the New York City Board of Education that Mrs. Lett had been employed by the Board of Education since July 1967 as a teacher's aide at a salary of $1.75 per hour, averaging 30 hours per week. It also contained names of private day care centers and dates on which Mrs. Lett allegedly worked during the months of September, October and November.

3. Mrs. Lett was employed by the New York City Department of Education during July and August of 1967. The Department of Social Services was fully aware of that and it was discussed during a fair hearing on July 20, 1967. During this period Mrs. Lett did not receive any public assistance.

4. Mrs. Lett had also informed her investigator that she was seeking day to day employment from the Professional Placement Center of the New York State Department of Labor; and the Department of Social Services was aware of her employment during September, October and November of 1967. The Department was informed of the

* Virginia Hubbard, age 15; Ann Byrd, age 12; Cladcile Byrd, age 7; and Aaron LaMent Hubbard, 3 months.

employment both by Mrs. Lett and by a Mrs. Levine of the Professional Placement Center who had written to the Department of Social Services in support of Mrs. Lett's request for a telephone so that she could be reached each day for employment.

5. Mrs. Lett and her four children have not been able to maintain a minimum diet since their aid was discontinued. They have been forced to depend on the charity of their neighbors. Mrs. Lett has no financial resources with which to feed herself and her dependents.

6. On February 18, 1968, they were forced to go to Harlem Hospital for treatment of a severe case of diarrhea. The only meal they had eaten that day was chicken and rice donated by neighbors.

7. On the night of Thursday, February 22, 1968 Mrs. Lett went to the Emergency Welfare Center located at 11 West 13th Street, New York, New York. When she explained to Defendant's employees at the Center that she was starving and needed money for food for herself and the four children, she was turned away on the grounds that she had concealed assets and therefore was ineligible for emergency assistance.

XI

Sections 213(2), 304, 325 and 353(2) of the New York Social Services Law, and 18 N.Y.C.R.R. Section 356.4 as in effect and as amended by 18 N.Y.C.R.R. Section 82.2-82.23, effective March 1, 1968, prescribing the hearing procedure in the public assistance program, and Sections 214, 304(6), 325 and 350(2) (b) and 18 N.Y.C.R.R. 351.22 and 351.26 (effective March 1, 1968) prescribing the manner of termination or suspension of aid in the public assistance

program, on their face, and as interpreted and applied to plaintiffs and members of their class, deprive the plaintiffs of the right of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and, to the extent applicable, of the "Fair Hearing" guaranteed by the Social Security Act in that said statutes and the regulations adopted in enforcement thereof authorize and require effective action terminating and suspending financial aid prior to the granting of reasonable notice and opportunity for a hearing which meets due process standards. The termination and withdrawal of financial aid may, under the presently enforced regulations, extend for a period of several months before a hearing is held and a decision is rendered, even though plaintiffs are prepared to prove that they are and have been eligible. Such deprivation is contrary to the purpose of the Social Security Act.

XII

Plaintiffs have no adequate remedy at law and defendants will continue to cause and threaten to cause irreparable injury to plaintiffs unless enjoined by this Court.

XIII

Plaintiffs have no adequate resources with which to support themselves and their families in the absence of their public assistance grants.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated, that this court:

1. Assume jurisdiction of this cause and convene a three-judge Court pursuant to Title 28 U.S.C. §2281.

2. Enter a temporary restraining order and a preliminary injunction ordering the defendants to refrain from

a. refusing to pay the named plaintiffs herein their regular public assistance grants and

b. terminating aid to any recipient of public assistance without giving advance written notice stating the reasons for such action and without affording such recipient an opportunity for a hearing which meets the requirements of due process of law prior to withdrawal of aid.

3. Enter a declaratory judgment pursuant to Title 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that Sections 213(2), 214, 304, 325, 350(2) (b) and 353(2) of the New York Social Service Law and related provisions, and the regulations and rules issued pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, insofar as they authorize and require termination or suspension of public assistance prior to granting reasonable notice and opportunity for a hearing meeting due process standards.

4. Enter a preliminary and permanent injunction restraining the defendants, their successors in office, agents and employees from terminating or suspending the aid of any public assistance recipient prior to the granting of reasonable and adequate notice and opportunity for a hearing which satisfies the standards of due process of law.

5. Allow plaintiffs their costs herein, grant them and all others similarly situated such additional or alternative relief including payment of all monies wrongfully withheld, as the Court may deem to be just and appropriate.

6. Award plaintiff Esther Lett and each of her four minor dependents, Virginia Hubbard, Ann Byrd, Cladcile Byrd, and Aaron LaMent Hubbard, damages in the amount of Ten Thousand Dollars ($10,000).

Respectfully submitted,

HAROLD J. ROTHWAX, Esq.
Attorney for Plaintiffs
Ruby Sheafe

DAVID GILMAN, Esq.
Of Counsel

SHYLEUR BARRACK, Esq.
Attorney for Plaintiff
Esther Lett

RICHARD KWASNICK, Esq.
Of Counsel

MARTIN GARBUS, Esq.
Attorney for Plaintiffs
Roger Baldwin Foundation of the American Civil Liberties Union

CARL RACHLIN, Esq.
Attorney for Plaintiffs
Scholarship, Education and Defense Fund for Racial Equality

STEVE NAGLER, Esq.
Of Counsel

Of Counsel

BRIAN GLICK, Esq.
HENRY A. FREEDMAN, Esq.

Exhibit A Annexed to Foregoing Complaint

Notice of Discontinuance of Grant Dated February 5, 1968

(See Opposite ☞)

77a

THE CITY OF NEW YORK
DEPARTMENT OF WELFARE

		CASE NUMBER
15		2535965

SPEAFE RUBY
836 W 34 ST

ACTION — DATE
CASE CLOSED
NYC10001I 02/17/68 002731

NOTICE OF DISCONTINUANCE OF GRANT

This is to notify you that:

☐ During your period of hospitalization you will not receive your regular half-monthly grant. When you are discharged, please notify this office immediately so that the regular grant for which you may be eligible can be resumed.

☐ Your regular grant is being suspended, effective immediately, for the following reasons:

☒ Our investigation shows that, effective immediately, you are not eligible to receive public assistance for the following reasons:

REFUSED TO PERMIT VISITS (COLLATERAL)

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

[signature] 2/5/68 23-5
STAFF SUPERVISOR DATE CASELOAD

Exhibit "A"

Affidavit of Richard Kwasnik in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

RICHARD KWASNIK, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York. I am employed by the Legal Aid Society, 290 Lenox Avenue, New York, New York, and in that capacity represent Mrs. Esther Lett, plaintiff in the above entitled action.

2. This is a class action seeking injunctive and declaratory relief against termination of public assistance without a due process hearing prior to termination of benefits. It is therefore similar to *Kelly, et al.*, v. *Wyman, et al.*, Civil Action No. 394/68, now before this Court.

3. Plaintiffs' request herein for immediate and, if necessary, ex parte relief is made because of defendant's continuous refusal to rectify their obvious error, as set forth below and in my prior affidavit attached hereto. Plaintiff Esther Lett and her four minor dependents, age 3 months to fifteen years, though fully eligible for public assistance, have been dropped from the rolls and left to depend solely on the charity of their neighbors, themselves welfare recipients. Substantial irreparable injury has already been caused, and the Department remains callous in the face of completely justified pleas.

4. Mrs. Lett was terminated allegedly because the Board of Education of the City of New York certified that she was currently employed by them. I went personally to the offices of the Board and was advised, as set forth in my affidavit, that a terrible mistake had been made and that Mrs. Lett had not been employed by the Board since last August. The Board would not write a letter to the Department of Social Services correcting their previous letter even though I advised them of the great hardship that had been caused by their gross negligence.

5. As set forth in my aforementioned affidavit, co-counsel for Mrs. Lett requested an emergency fair hearing by defendant Wyman on February 19, 1968. There has been no response to this request. Mrs. Lett was denied any assistance whatever at the Emergency Center operated by defendants the evening of February 22, 1968.

6. Mrs. Lett waited at the Melrose Welfare Center operated by defendants from early in the morning of February 27, 1968 until 5 P.M. During the afternoon she fainted since she had had no food whatever all day. She was revived but was told that she could not be given any assistance since it had not been authorized yet! At five o'clock she was given $15 and told to return Friday, three days later.

7. The Corporation Counsel and Attorney General's office were notified on February 26 of the continuing injury being done to Mrs. Lett and that papers were being drawn to commence a federal action.

8. I spoke with Mr. Luis Neco of the Corporation Counsel's office, an attorney who is familiar with the facts and issues in *Kelly* v. *Wyman*, this morning, February 29, 1968, and he suggested that I talk to Mr. Charlton of the office

of Counsel to the New York City Department of Social Services. After advising him of all of the facts of the case, he said he would take the case under advisement and check the facts. He could not assure me of any immediate or long-range relief.

9. Co-counsel and I had advised all of the aforementioned lawyers that we wished to settle the case and not litigate.

10. Defendant Wyman has ordered defendant Goldberg to institute, effective tomorrow, March 1, new procedures providing for an interview prior to termination. Despite this official recognition of the need for such procedure, no relief has been granted to Mrs. Lett, an obvious and tragic victim of the present system.

11. The obvious insensitivity of the officials I have dealt with and their unwillingness to make any meaningful efforts to alleviate grievous human suffering is literally beyond belief. The physical and emotional injury being wreaked on Mrs. Lett and her four dependents can never be fully ameliorated. During 1967 Mrs. Lett's assistance was wrongfully terminated and she had to wait for a fair hearing decision for reimbursement. Only this Court can end this senseless harm.

12. Plaintiffs herein, in lieu of Points and Authorities, are attaching hereto and incorporating by reference the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, Convening of Three-Judge Court, and Class Action Order submitted in *Kelly et al.*, v. *Wyman et al.*, Civil Action No. 394/68.

13. The temporary relief sought in this order to show cause is similar to that obtained in *Wheeler et al.* v. *Mont-*

gomery et al., Civil Action No. 48303 (N.D. Calif., December 6, 1967.) A copy of that temporary restraining order is attached to the Points and Authorities submitted herewith as Exhibit B. District Judge Zipoli found that termination of aid had "caused and is causing [plaintiff] immediate and irreparable injury in that she will not have sufficient funds with which to subsist on a day-to-day basis without her full [public assistance] payment." He further found that the termination of aid "without a prior hearing and reasonable notice raises a debatable question as to whether the due process clause of the Fourteenth Amendment has been violated."

14. At or about 2:00 P.M. today David Gilman, in my presence, telephoned Mr. Joel Sachs of the New York State Attorney General's office and Mr. Luis Neco of the City of New York Corporation Counsel's office and notified them that we would submit this order to show cause at 3:45 P.M. today in Judge John Cannella's chambers.

15. No previous request has been made for this relief.

Richard Kwasnik

(Sworn to February 29, 1968.)

Affidavit of Richard Kwasnik in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

RICHARD KWASNIK, being duly sworn, deposes and says:

1. I reside at 529 West 111 Street, New York, New York.

2. I am an attorney duly admitted to practice in the State of New York and I am employed as an attorney by the Legal Aid Society, 290 Lenox Avenue, New York, New York.

3. I make this affidavit in support of plaintiffs' motions for a temporary restraining order and a preliminary injunction.

4. I was consulted by Mrs. Esther Lett on February 23, 1968, regarding the Department of Social Services' discontinuance of public assistance aid to herself and four dependent children.

5. She produced the Notice of Discontinuance of Public Assistance and an attached letter, which, in essence, stated that Mrs. Lett had concealed assets while in receipt of public assistance. The Department, in their attached letter, claimed Mrs. Lett was an employee of the Board of

Education and also listed certain private day care centers in which Mrs. Lett was employed during September, October and November, 1967.

6. Mrs. Lett stated that she worked for Operation Head Start during July and August, 1967, but was not employed by the Board of Education since that time. She stated that the employment during September, October and November was with the full knowledge of the Department of Social Services. From the facts presented to me it appeared that the termination of assistance was wholly in error.

7. I phoned Miss Solomon, the caseworker who had been assigned to Mrs. Lett's case, at the Herald Welfare Center, 120 West 32 Street, New York, New York. She said Mrs. Lett's aid was discontinued because of her failure to disclose employment.

8. I spoke with the Unit Supervisor, Mrs. Pearlman, who repeated what Miss Solomon had stated.

9. I informed Mrs. Pearlman that Mrs. Lett and the four children were on the edge of starvation and needed emergency aid immediately. I was told that she could try to apply at her local center.

10. Mrs. Lett told me that she had applied at the Emergency Center at 11 West 13 Street on the night of February 22, 1968, but was denied aid because she was catalogued in their records as ineligible.

11. While in my office Mrs. Lett appeared to be suffering from hunger. She sat doubled up and clutching her stomach. She related that the only food she and her family had was hand-outs from her impoverished neighbors.

12. She detailed how she and her family went to Harlem Hospital on Sunday, February 18, 1968, to be treated for severe diarrhea. That day they had only one meal of chicken and rice, donated by a neighbor. The food had apparently been below minimum standards of health and caused the family to become violently ill.

13. I gave Mrs. Lett three dollars so that she might immediately go to get a meal. When she returned, she was given an additional fifteen dollars from the Legal Aid Society in order to provide food for the weekend.

14. On Monday, February 26, 1968, I called Mrs. Lett's former caseworker, Miss Solomon. I asked to inspect the Board of Education verification of Mrs. Lett's alleged employment. Initially my request was denied, but later Miss Solomon said it was available upon the presentation of a written, notorized authorization from my client.

15. I was shown the document on Tuesday, February 27. I then went directly to the issuing authorities at the Board of Education, Bureau of School Lunches, 65 Court Street, Brooklyn, New York. There I spoke with Mrs. Stolzer under whose name the employment verification in question had been issued.

16. Mrs. Stolzer, after rechecking the bureau records, admitted that a mistake had been made. I was told that Mrs. Lett last received a check from the Board of Education on September 15, 1967, for work performed during August of 1967. Mrs. Lett has not been employed by the Board of Education since mid-August.

17. Mrs. Stolzer stated that the error would be corrected if the Department of Social Services requested a

new verification. I was denied a written statement as to Mrs. Lett's correct employment record.

18. On this same day, I called Mrs. Pearlman, supervisor of Mrs. Lett's former caseworker, and advised what I had learned at the Board of Education. Mrs. Pearlman stated that Mrs. Lett's records had been sent to the Melrose Center in the Bronx. Mrs. Pearlman said she was no longer interested in the case and hung up the phone.

19. Mrs. Lett and I had gone to the Melrose Center of the Department of Social Services located at 847 Morris Avenue, Bronx, New York, Tuesday, February 27, 1968, to seek emergency aid. I stayed with Mrs. Lett while she was interviewed at the center's Intake Unit. I left Mrs. Lett at the center at 11:00 A.M. when I was assured by Mr. Craine, Intake Unit Supervisor, that she would receive emergency assistance.

20. At approximately 4:00 P.M. Mrs. Lett phoned my office. She stated that she hadn't, as of that time, received any aid. She said that earlier in the afternoon she had fainted in the center. She attributed her weakened condition to hunger, she had not eaten all day. She stated that she asked for money to immediately get some food. She said it was refused because emergency aid had not yet been authorized.

21. After waiting until 5:00 P.M., Mrs. Lett was given $15.00 to feed herself and four dependents. It was an emergency basis single issue grant. She was told to return on Friday, March 1, 1968. There was no assurance that she would receive further aid on Friday.

22. It should be noted that a Fair Hearing was held on August 1, 1967 where Mrs. Lett contested, among other

things, the Department of Social Services suspension of aid for the period March 1 to March 23, 1967. The decision in this matter (copy annexed Exhibit 1) dated Nov. 2, 1967, held that Mrs. Lett had been wrongfully suspended. The Department was ordered to reimburse Mrs. Lett for expenses incurred during this period of wrongful suspension.

23. A request for a Fair Hearing and emergency aid for Mrs. Lett and her dependents was made on Feb. 19, 1968 (copy hereto annexed as Exhibit 2). No response has yet been received from defendants.

24. The discontinuation of aid has caused irreparable harm and suffering to Mrs. Lett and her four young dependents.

25. Plaintiffs have made no previous request for relief from this Court.

Richard Kwasnik, Esq.

(Sworn to February 28, 1968.)

Exhibit 1 Annexed to Foregoing Affidavit

Decision After Hearing

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

ESTHER LETT

from determinations by the New York City Department of Social Services relating to the adequacy of a grant of Aid to Dependent Children.

The above named Esther Lett, hereinafter referred to as the appellant, having appealed from determinations by the New York City Department of Social Services hereinafter referred to as the agency, relating to the adequacy of a grant of Aid to Dependent Children, and a hearing having been held at the office of the State Department of Social Services located at New York, New York on the 1st day of August, 1967 before Frederick Goldfeder, Esq., Referee; and the appellant, Esther Lett, having appeared in person, represented by Stephen Nagler, Esq.; and David Gilman, Esq., and the agency having appeared by Mae Feinstein, Administrator, Fair Hearings and Dennis O'Connor, Esq., also having been present; and an opportunity to be heard having been accorded all interested parties herein and the evidence having been taken, the record read and due deliberation having been had, it is hereby found:

Exhibit 1

1) The appellant, Esther Lett, 38 years of age, is married and resides at New York, New York with her two children, the eldest being 16 years of age and the youngest being 6 years of age.

2) The appellant appealed from failure of the agency to act upon a request of a special grant for clothing and household items; improper suspension of the grant of Aid to Dependent Children for the period March 1 to March 23, 1967 which resulted in the need to borrow $45 for necessities; failure of the agency to pay carfare and expenses to enable the appellant to attend an "orientation" course for "Operation Head Start" employees at Hunter College; failure of the agency to properly budget the appellant's shelter allowance which failure resulted in dispossess proceedings being brought and failure of the agency to pay car fare and other expenses incurred by the appellant in visits to the Social Services Center made at the agency's request and in attending the Fair Hearing.

3) The agency admitted receipt of the appellant's request for items of special need dated April 21, 1967. On May 22, 1967 a home visit was made during which, the agency claims, the appellant's needs were fully explored and a special grant issued to cover all items of need which were verified by the appellant. The appellant admitted receipt of the grant, but she bought items she needed, without regard to the specific items covered by the grant. She stated she still needed clothing and household items, some of which were not previously requested.

4) The agency stated that the temporary suspension of the grant of Aid to Dependent Children was made because the agency had no official knowledge of the appellant's residence, so that only emergency assistance was granted. However, the agency's record and testimony shows that it

was paying, as emergency assistance, verified rent of the appellant's place of residence and that the appellent was frequently seen by the agency's staff. The appellant stated that she incurred debts of $45 due to the suspension.

5) The agency's position with respect to the shelter allowance was that the appellant diverted one-half month's rent, which was the cause of her constantly being one-half month in arrears, but that it authorized duplication of the grant to the extent of one-half month shelter allowance in order to bring the rent up to date.

6) The agency's position with respect to car fare and expense while attending Hunter College was that this was to be paid by "Operation Head Start" and that no prior request was made for the other car fare items. The amount of school car fare for her children would be added to the budget when verified. Lost wages, caused by visits to the social services center, would be covered, since only actual wages received is a resource in calculating budget deficit.

The entire record having been carefully considered, it is determined that the agency made a proper evaluation of the appellant's request for items of special need, in accordance with the provisions operations 351.1(a), 351.1(d), 351.2(b) and 351.11 of the regulations of the State Department of Social Services. Needs arising since the issuance of the special grant made as the result of the home visit May 22, 1967, having now been brought to the attention of the agency, should be investigated in accordance with its policy.

The agency's suspension of assistance was improper.

Appellant's attendance at the Hunter College Orientation course was an expense incident to employment which should be met in accordance with the provisions of section 352.5(b).

Exhibit 1

The agency's duplication of shelter allowance was sufficient to insure the appellant remaining in her apartment.

IT IS THEREFORE HELD THAT:

The agency's action in response to the appellant's request for items of special need, dated April 21, 1967 was proper, and is affirmed.

The appellant's complaint with respect to the alleged inadequacy of the shelter allowance has been satisfied.

The agency is directed to investigate the expenses incurred by the appellant in attending the "Operation Head Start" orientation course, to reimburse the appellant for verified expense not included in her budget and not payable by others, and make its report thereon in accordance with section 356.4(e) of the Regulations of the State Department of Social Services.

The agency is directed to calculate the appellant's budget for the period of suspension, subtract therefrom the amount of emergency assistance given to the appellant and reimburse her for the difference. The agency is further directed to make its report thereon in accordance with the provisions of Section 356.4(e) of the Regulations of the State Department of Social Services.

Dated: Albany, New York
Nov. 2, 1967

S/ George W. Chesbro
Acting Commissioner

Exhibit 2 Annexed to Foregoing Affidavit

Request for Fair Hearing Dated February 19, 1968

February 19, 1968

Hon. Joseph Louchheim
Deputy Commissioner
State of New York Department
of Social Services
270 Broadway
New York, New York 10007

Re: LETT, Mrs. Esther Non-resident Center
354 Cypress Avenue Apt. 52
Bronx, New York

Dear Commissioner Louchheim:

On behalf of the above named client we request an emergency fair hearing to correct the arbitrary closing of Mrs. Lett's case and to recover any expenses incident to the closing as well as the failure of the agency to meet her clothing and household needs.

Thank you for your cooperation.

Very truly yours,

Stephen M. Nagler

SMN:n

cc: Comm. Goldberg

Affidavit of Esther Lett in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MRS. ESTHER LETT, being duly sworn, deposes and says:

1. I live at 354 Cypress Avenue, Apt. 52, Bronx, New York. I have four dependents, all nieces and nephews, aged 3 months, 7, 12, and 15. We received public assistance until February 1, when aid was abruptly terminated.

2. I am absolutely destitute, and am on the verge of starvation, as are my four dependent children. The Department of Social Services has refused to respond to requests made by both me and my attorney to rectify their error and restore full public assistance. I am completely desperate and do not know what I am to do if the Department fails to provide the aid to which I am entitled.

3. On February 18, 1968, I had to go to Harlem Hospital with my dependents for treatment of diarrhea caused by eating some spoiled food given us by a neighbor. We have been forced to subsist on such hand-outs because our welfare payments were cut off as of February 1, 1968.

Affidavit of Esther Lett

4. On February 22, 1968, I went to the Emergency Welfare Center at 11 West 13th Street in New York City, in utter desperation, and was refused assistance.

5. I was refused welfare after February 1, 1968, on the grounds of "concealment of assets". The Department of Social Services claims that I have earned $1,982.00 working as a teacher's aide for the Board of Education from July 11, 1967 to February 2, 1968. Although I worked for the Board of Education this past summer for six weeks in the Head Start program, I have not been employed by the Board since August 20, 1967. My total income working for Head Start from July 8 to August 20, 1967 was $350.00. Not only was the Department aware of this employment, but it was discussed at a fair hearing before the State Department of Social Services on July 20, 1967.

6. After August 20, 1967 I worked at Day Care Centers on 26 different days, sometimes working for the entire day, other times working for only half a day. My total income from this substitution work was $300.00, and this is the only income I have been able to obtain since August 20, 1967.

7. Early Tuesday morning February 27, 1968, I went to the Department of Social Services' Melrose Center to seek emergency aid. During the afternoon, while my request was presumably being processed, I fainted. I had no food to eat since I awoke that morning. When I revived I requested money for food, but was told that authorization in my case had not yet been approved. At 5:00 P.M., after waiting eight hours, I was given a single issue emergency grant of $15 and told to return on Friday. I was given no assurance that I would receive any further assistance on Friday.

Affidavit of Esther Lett

8. I have no money, and have been living these past three weeks from what little food my neighbors could spare for myself and my four dependent children. We will all starve without being restored to full public assistance. I have told the Department of Social Services the truth, but they have erroneously decided that I am earning a lot of money and concealing it. I have not seen the letter from the Board of Education to the Department of Social Services, so I do not know who is making the mistake. But someone will have to correct the mistake, because we are all so much in need of aid. This is an awful thing to happen right here in New York City in 1968.

Esther M. Lett

(Sworn to February 28, 1968.)

Affidavit of David Gilman in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

DAVID GILMAN, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York, and am employed as an attorney in the Legal Service Unit of Mobilization for Youth, Inc., 759 Tenth Avenue, New York, New York. In this capacity I am of Counsel to Harold J. Rothwax, the Attorney of Record for Mrs. Ruby Sheafe, Plaintiff in the above-entitled action, and in this capacity I have represented Mrs. Sheafe from February 19, 1968, to the present time.

2. On February 19, 1968 Mrs. Sheafe came to our office and told me that her public assistance aid had been discontinued effective January 16, 1968. Mrs. Sheafe produced a "Notice of Discontinuance of Grant" (attached to the complaint as Exhibit A) dated January 17, 1968, that gave the reason for discontinuance as "refusal to permit visits (Collateral)".

3. Mrs. Sheafe told me that on January 8, 1968, she had visited the Gramercy Welfare Center and spoken with her worker, Mrs. J. Mitchell, who had informed Mrs. Sheafe that assistance would be cut off because Mrs. Sheafe

refused to give the name, address and telephone number of her former employer. Mrs. Sheafe told me that she insisted upon being informed of the reason for disclosure of this information, and that the worker refused to provide any. The worker then informed Mrs. Sheafe she would receive no further public assistance.

4. Mrs. Sheafe told me that she worked part time for Dr. Edward F. Hartung, M. D., with offices at 580 Park Avenue, New York, New York. She worked a few evenings each week, was paid by the hour, and averaged about $25.00 a week. She has been employed by Dr. Hartung for approximately the last fourteen months.

5. On January 26, 1968 Mrs. Sheafe has requested an impartial review of her case by the State Department of Social Services, in the letter attached hereto as Exhibit B.

6. I called the State Department of Social Services on February 19, 1968, and was informed that since Mrs. Sheafe had been receiving Home Relief she has no statutory right to a hearing prior to March 1, 1968.

7. I then called the New York City Department of Social Services, Waverly Welfare Center, and spoke with Mr. Young, who was Mrs. Sheafe's Unit Supervisor. He informed me that Mrs. Sheafe's case was not closed, suspended or discontinued but was considered to be a "pending case" awaiting further investigation. Mr. Young acknowledged that no assistance has been provided to Mrs. Sheafe since January 1, 1968.

8. I requested a meeting with Mr. Young, Mrs. Sheafe and you deponent to determine if the issue of eligibility could be resolved. This meeting was scheduled for February 26, 1968.

Affidavit of David Gilman

9. On February 26, 1968 a meeting was held with Mr. Young, Unit Supervisor and the case worker. I was informed that Mr. Young would present the case to his superiors and would call me that very afternoon and advise me whether the case would be reopened. I have had no further communication from Mr. Young regarding our client's eligibility. I have called Mr. Young at least five times in the last two days. Each time I called I was informed that Mr. Young was not in and that he would return my call, as of date I've had no response.

10. Since public assistance was terminated Mrs. Sheafe has not had enough money to pay her rent and pay for other necessities of life. She has been able to survive solely due to the fact that her landlord, the Y. W. C. A. at 356 West 34th Street, has allowed her rent bills to accumulate. Mrs. Sheafe's immediate needs are being met from a five dollar loan from Mobilization for Youth, but obviously this source of support cannot be continued.

David Gilman

(Sworn to February 27, 1968.)

Affidavit of Luis M. Neco in Opposition to Plaintiffs' Motion and in Joinder of Defendants' Cross-Motion

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

LUIS M. NECO, being duly sworn, deposes and says:

1. Deponent is an Assistant Corporation Counsel in the office of J. Lee Rankin, Corporation Counsel, the attorney for defendant Jack R. Goldberg, Commissioner of the New York City Department of Social Services. Deponent is admitted to practice law in the State of New York and before this Court.

2. Deponent makes this affidavit in opposition to the motion of plaintiffs for a preliminary injunction, the convening of a three-judge court and a class action order. Defendant Goldberg also joins in a motion by the remaining defendants for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted.

3. The complaint and motion are brought by five public assistance recipients who allege that their individual public assistence benefits were terminated without a hearing having been accorded each one prior thereto. A sixth plaintiff claims imminent termination.

4. The prayer for relief in the complaint seeks to have the court:

"1. Assume jurisdiction of the cause and convene a three-judge Court pursuant to Title 28 U.S.C. §2281.

2. Enter a temporary restraining order and a preliminary injunction ordering the defendants to refrain from

1. refusing to pay the named plaintiffs herein their regular public assistance grants and

2. terminating aid to any recipient of public assistance without giving advance written notice stating the reasons for such action and without affording such recipient an opportunity for a hearing prior to withdrawal of aid.

3. Enter a declaratory judgment pursuant to Title 28 U.S.C. Sections 2201 and 2002 and Rule 57 of the Federal Rules of Civil Procedure declaring the Sections 213(2), 214, 304, 325, 350(2)(b) and 353(2) of the New York Social Service Law and related provisions, and the regulations and rules issued pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, insofar as they authorize and require termination or suspension of public assistance prior to granting reasonable notice and opportunity for a hearing meeting due process standards.

4. Enter a preliminary and permanent injunction restraining the defendants, their successors in office, agents and employees from terminating or suspending the aid of any public assistance recipient prior to the granting of reasonable and adequate

notice and opportunity for a hearing which satisfies the standards of due process of law.

5. Allow plaintiffs their costs herein, grant them and all others similarly situated such additional or alternative relief including payment of all moneys wrongfully withheld, as the Court may deem to be just and appropriate."

5. Plaintiffs' motion seeks:

"1. A preliminary injunction enjoining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from:

(1) refusing to pay the named plaintiffs herein their regular public assistance grants, to wit, semi-monthly payments in the amounts indicated: John Kelly, $80.05; Randolph Young, $57.00; Juan DeJesus, $56.80; Pearl Frye, $126.00; Pearl McKinney, $155.00; and Altagracia Guzman, $85.00; and

(2) suspending or terminating aid to any recipient of public assistance without giving advance written notice stating the reason for such action and without affording such recipient an opportunity for a due process hearing prior to withdrawal of aid.

The grounds of this motion, as more fully set forth in the verified complaint filed January 29, 1968, and the annexed affidavits of Henry A. Freedman, dated February 1, 1968; Edward V. Sparer, dated January 28, 1968; Stephen Wizner, dated January 28, 1968; Peter H. Darrow, dated January 29, 1968; and Marilyn Becker, dated January 29, 1968, are that:

a. Plaintiffs and all members of the class are either suffering or threatened with irreparable in-

jury in that they are now, or may at any time be, without means to provide for themselves the basic necessities of food, clothing and shelter.

b. The issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiffs.

c. The statutes and regulations which deny plaintiffs a hearing prior to termination or suspension of public assistance violate plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States.

d. Plaintiffs have no adequate remedy at law.

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary injunction and this cause, in accordance with the provisions of Title 28 United States Code Sections 2281 and 2284.

3. An order determining that this action may properly proceed as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure."

6. Defendant Goldberg's grounds for opposition to plaintiffs' motion is that the controversy herein has been rendered moot in that said plaintiffs have been accorded the relief prayed for in their motion insofar as the State Department of Social Services has promulgated amendments to its rules and regulations to provide for notice and a hearing prior to suspending or terminating public assistance benefits. The case has further been rendered moot in that all of the plaintiffs, except plaintiff Young, are currently receiving public assistance benefits. Plaintiff

Young is presently in Manhattan State Hospital undergoing treatment for detoxification of narcotics, and is therefore not presently entitled to public assistance benefits.

The Instant Controversy is Moot

I. Amendments recently promulgated by the State Department of Social Services require notice and a hearing prior to termination or suspension of benefits.

7. The affidavit of Assistant Attorney General Joel L. Sachs dated February 21, 1968 in opposition to plaintiffs' motion and in support of defendants' (other than defendant Goldberg) motion shows that the New York State Department of Social Services has amended its regulations to provide for adequate and full notice, and a hearing with the right of representation by counsel prior to the suspension or termination of public assistance (Sachs affd. pp. 2-3; Exhibit A). In addition, the fair hearing procedures have been amended to extend to all welfare recipients, and to give timely notice of such fair hearing right. The recipient is notified that he may be represented by counsel, and that he has all the other "due process" procedural rights. (Sachs affd. p. 3; Exhibit B).

8. The above amendments are binding on defendant Goldberg and will be implemented as expeditiously as possible. (Affidavit of Merrill Charlton, p. 5).

9. Thus, the controversy between plaintiffs and defendants is moot.

II. Plaintiffs have had their benefits restored, while one never had her benefits suspended or terminated.

10. As the annexed affidavit of Merrill Charlton shows, plaintiff Guzman never had her public assistance benefits

suspended or terminated. Plaintiffs Kelly, DeJesus, McKinney and Frye have had their public assistance benefits restored. Plaintiff Young is presently in Manhattan State Hospital undergoing treatment for detoxification of narcotics, and is therefore not presently entitled to public assistance benefits. Plans have been made, however, to render such assistance to him as soon as he is discharged from the hospital and applies for such benefits (Charlton affd. pp. 1-4).

11. Thus, there is no longer any controversy between plaintiffs and defendant Goldberg, and the instant proceeding is moot.

12. Defendant Jack R. Goldberg joins with the remaining defendants in their arguments against the convening of a three-judge statutory court and the designation of the instant case as a class action.

13. In addition, because the mootness of the instant controversy is clear defendant Goldberg does not presently fully urge that the Court apply the salutary doctrine of abstention. He nevertheless reserves his right to urge its application if deemed necessary.

WHEREFORE, defendant Jack R. Goldberg respectfully requests that plaintiffs' motion for a preliminary injunction, the covering of a three-judge statutory court and a determination that the instant action be designated a class action be denied and that the motion of the remaining defendants to dismiss the complaint be granted as to all defendants.

Luis M. Neco

(Sworn to February 29, 1968.)

Affidavit of Merrill Charlton in Opposition to Plaintiffs' Motion and in Support of Cross-Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MERRILL CHARLTON, being duly sworn, deposes and says:

I am an assistant attorney in the Legal Division of the Department of Social Services of the City of New York. I submit this affidavit in support of defendant Jack R. Goldberg's opposition to plaintiffs motion and in support of the remaining defendants' cross-motion.

I have been duly admitted and actively engaged in practice in all courts of record of the State of New York since 1939, and am also a member of the bar of this Court and of the Supreme Court of the United States.

I am familiar with the facts and circumstances of this suit from its inception on January 29, 1968. My sources of the following facts concerning these plaintiffs and the grounds of my belief thereof are the official records of the Department of Social Services of the City of New York kept and maintained in the regular course of business for each of them, all in my possession, and my conversations with Department employees in respect to them.

As to plaintiff Randolph Young, our official records show that he has a substantial history as a narcotic user and an alcoholic. At present he is an inmate of Manhattan State Hospital (Ward 3B) at Ward's Island, where he

has been taking the 25 day detoxification treatment since on or about February 14, 1968. He is expected to be released therefrom on or about March 10, 1968. Miss Helen Eberlin, welfare case supervisor at Amsterdam Center, informed me on February 27, 1968, that plans for Mr. Young are being made to enable him to be taught a skill by which he can become self-sustaining and rehabilitated; that such plans have been in the offing for quite some time. Of course, he will be given public assistance until he learns this skill as long as he maintains his eligibility therefor. This is standard help made available by the Department for people such as Mr. Young. During the period of hospitalization, however, Mr. Young is ineligible for public assistance.

We come now to the case of plaintiff Altagracia Guzman. Admittedly, her public assistance has not been suspended or discontinued, and she still is getting her allotted grants. Since she is not an aggrieved party, her complaint should be dismissed outright as matter of law.

Our case record shows that plaintiff John Kelly changed his address so often that it was almost impossible to keep contact with him to send him his grants, and that the Department had to chase after the checks sent to him at his last known addresses where he did not stay long enough to pick them up, and for all of which he was issued replacement funds. It is simply incorrect for his complaint (pages 5 & 6) to allege that his case was closed because he violated a caseworker's orders to move out of the Broadway Central Hotel. He never was told to move out of any hotel—he was told that he must obtain a permanent address in order for his public assistance to continue steadily. Not only that—on January 5, 1968 his case was closed due to a recommendation to reclassify his case to a (PAD) Presumptive Aid to Disabled category. He then disappeared and after some absence during which his whereabouts were unknown, he notified the Department that he was living on

Mott Street. On January 30, 1968 his case was reopened. In the meantime, whenever he came to the Welfare Center, both before and after the commencement of this action, he received emergency assistance in addition to his grants. At all events, on January 30, 1968 he was issued for food and other necessities $46.25 for the period January 30, to February 13, 1968, and rent in the sum of $30.25 for that period. He then received a follow up for food, rent and other items for the period February 14, to February 15, 1968 in the sum of $9.10, and for the period February 16 to February 29, 1968 he was given $76.50 for food, rent and other requirements. Since Mr. Kelly has been restored to public assistance he is not a genuinely aggrieved party.

As to plaintiff Juan De Jesus, on January 5, 1968 his case was closed because he refused to attend narcotics counseling or any rehabilitation clinic or center. He also refused to look for any kind of work and stated he would not accept any job when the case worker called the Claremont Majestic Agency for an appointment for him to see if they could get him a job. However, his case was reopened on January 30, 1968—he was given emergency funds in the sum of $9.15 for food and shelter at the Broadway Central Hotel, under the Homeless Women's Emergency Assistance Program and then our case worker obtained housing for him at the Regina Hotel, 202 E. 13th Street, and he thereupon was issued for food, rent and other needs $65.85 for the period January 31, 1968 through February 15, 1968. Mr. De Jesus, like the other plaintiffs, is now receiving his public assistance and is not a genuinely aggrieved party herein.

Plaintiff, Pearl McKinney, admittedly, received emergency assistance pending a reopening of her fair hearing. Her case was suspended on January 18, 1968 because her son, Marvin, failed to submit verification of his employment and income. Even now, he still resides in his moth-

er's house although her compaint says he was to have married and moved out long before this. He contributes nothing to the household. We stress the fact that this plaintiff's case was not closed. I recently received an official Department report showing the outcome of a Fair Hearing held for this plaintiff showing that the suspension was lifted on February 1, 1968, and all the benefits made available to her, conclusively establishing that she is not a genuinely aggrieved party.

Plaintiff Pearl Frye, about 33 years of age and unmarried, lives in a new, one family ranch type home at 176-22 Roe Road, Queens, with her eight children—six of whom are admittedly fathered by Joseph Frye, who bought this home. Pearl Frye's case has not been closed. On December 4, 1967 her case was *suspended* pending an investigation as to the ownership of this ranch home. Although she did not cooperate with the Department as she should have she tried to get the Department to pay, in addition to her regular grants, a sum of about $130.00 monthly for rent, but this was rejected. However, she did receive a grant of $120 which was to be used for furniture but she used it for food during the suspension of her case. On January 11, 1968 the Department decided to issue to this plaintiff emergency food and she was notified that she would receive a check for $135.35 on January 16, 1968, for food to cover the period from January 11, 1968 to January 15, 1968 equal to $33.50 and from January 16, 1968 to January 31, 1968 the sum of $101.85 totalling in all, the sum of $135.35. Since then, this plaintiff has been receiving public assistance and is not a genuinely aggrieved party.

In sum, no one plaintiff in the instant case has any legal basis for the relief sought.

Under section 61(1) of the New York State Social Welfare Law, the New York City Department of Social Services is a city public welfare district and as such, is an arm

of the State, and is subject to and bound by all rules and regulations promulgated by the State Commissioner and the State Board of Social Welfare. On Friday, February 16, 1968 I received a telephone call from JOEL H. SACHS, ESQ., attorney in the office of the State Attorney General in charge of the defense of GEORGE K. WYMAN, State Commissioner and defendant in this action, who apprised me of the fact that the State Department determined to amend its regulations concerning the procedure to be followed when a recipient's assistance is suspended or discontinued for ineligibility, thus substantially providing the plaintiffs in this case with the substantive relief they seek. This information was given to me in its general effect only and I did not report it to my superiors until something concrete could be forthcoming from Mr. Sachs thereon. When I appeared in this Court (Motion Part) on February 20, 1968, I received photocopies of the new regulations effective March 1, 1968, from Mr. Sacks and turned them over to my superior, Mr. Samuel Felder. I am informed by my superior, Harold W. Watchler, Esq., that the Department intends to comply therewith as fully and promptly as the circumstances will permit although, as yet, we have not been officially notified of these new regulations.

In view of all of the foregoing, no one plaintiff herein has a cause cognizable at law for the relief sought in this action, and it is respectfully submitted that plaintiffs' motion should be denied and defendants' cross-motion be granted in all respects.

Merrill Charlton

(Sworn to February 29, 1968.)

Notice of Defendants' Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ 864

RUBY SHEAFE, *et al.*,

Plaintiffs,

against

GEORGE K. WYMAN, *et al.*,

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the complaint dated the 29th day of February, 1968 and the annexed affidavit of JOEL H. SACHS, the undersigned will move this Court at a Motion Term thereof at Room 506, United States Courthouse, Foley Square, City of New York, on the 19th day of March, 1968 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss plaintiffs' complaint for failure to state a claim

upon which relief may be granted and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
March 6, 1968

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Wyman and the New York
State Board of Social
Welfare

To:

HAROLD ROTHWAX, ESQ.

SHYLEUR BARRACK, ESQ.

Affidavit of Joel H. Sachs in Support of Defendants' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Wyman, Commissioner of the New York State Department of Social Services, Jones, Chairman of the State Board of Social Welfare, Adams, Height, Kimmerer, Galbraith, Johannes, Hopkins, McConville, Hale, Hostein, Klingenstein, Berlinger, Jackson, Lopez and Bernstein, as members of the Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case. I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction, the convening of a three-judge statutory court and a determination that the action may proceed as a class action and in support of defendants' motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted.

This action, commenced by attorneys for the American Civil Liberties Union, Mobilization for Youth and the New York Legal Aid Society is a "test case" challenging the constitutionality of several provisions of the New York Social Welfare Law and the official compilation of Codes,

Rules and Regulations of the state of New York challenging State Welfare Law provisions as to the procedures to be followed when a welfare recipient's assistance is suspended or discontinued.

Since these motions seek the identical relief of the motions heretofore submitted in the companion case of *Kelly* v. *Wyman*, (68 Civ. 394), the defendants in lieu of points and authorities are attaching hereto and incorporating by reference the affidavit of Joel H. Sachs and accompanying exhibits dated the 21 day of February, 1968 and defendants' memorandum of law dated February 21, 1968 heretofore submitted to this Court in connection with *Kelly* v. *Wyman, supra,* to be argued before this Court on the return date of the instant motion.

WHEREFORE, the defendants respectfully request that plaintiffs' motions for a preliminary injunction, the convening of a three-judge statutory court and a determination that the action may proceed as a class action be denied and it is further requested that defendants' motion to dismiss the complaint be granted.

Joel H. Sachs

(Sworn to March 6, 1968.)

Supplemental Affidavit of Merrill Charlton in Support of Defendants' Motion

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MERRILL CHARLTON, being duly sworn, deposes and says:

1. I make this affidavit to supplement my affidavit dated February 29, 1968. Since the execution of that prior affidavit I have learned of two developments which this court should be apprised of.

2. By letter dated February 28, 1968, Plaintiffs Pearl Frye has informed the Department of Social Services of the City of New York that:

"I don't want any more Welfare."

(A copy of that letter is annexed hereto as Exhibit A.)

3. Thus, Plaintiff Frye voluntarily relinquished any claim she may have had to public assistance benefits.

4. In addition, on February 29, 1968 the Department received an official bulletin from the State Department of Social Services containing the amendments of rules and regulations annexed to the affidavit of Joel H. Sachs as Exhibits "A" and "B".

5. I am informed that the Department is presently in the process of expeditiously conforming its procedures to the newly amended procedures governing notice and a hearing prior to suspension or termination of public assistance benefits, as contained in amended Regulation §351.26.

Merrill Charlton

(Sworn to March 14, 1968.)

Exhibit A Annexed to Supplemental Affidavit of Merrill Charlton

Note Dated February 28, 1968

(See Opposite ☞)

July 22 1962

Mr. Turpin
I don't want any more welfare
I will not be at hearing one
friday

If I need any relief it
will be for my Children

Rose Ivy

Affidavit of David Gilman in Support of Foregoing Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

DAVID GILMAN, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York, and I am employed as an attorney in the Legal Service Unit of Mobilization For Youth, Inc., 759 Tenth Avenue, New York, New York. In this capacity I am of Counsel to Harold J. Rothwax, the attorney of record for Mrs. Ruby Sheafe, Plaintiff in the above-entitled action.

2. Your deponent has been informed that Mrs. Sheafe's employer, Dr. Hartung has commenced his vacation as of March 15, 1968, and will not return to New York City until the middle of April, thereby, leaving Mrs. Sheafe without part time employment.

3. Mrs. Sheafe has informed your deponent, that her rent has not been paid since her assistance has been terminated, that her landlord has threatened to evict her, and that she has no money for food. Mrs. Sheafe has stated that she has not been able to afford to eat regularly.

Affidavit of David Gilman

4. In order that Mrs. Sheafe have money to buy food last week, your deponent made available $15.00 for Mrs. Sheafe, out of his own pocket.

5. Your deponent contends that without immediate restoration of Mrs. Sheafe to the Relief Rolls, she faces the stark reality of starvation and eviction.

David Gilman

(Sworn to March 19, 1968.)

Supplemental Affidavit of Merrill Charlton in Opposition to Plaintiffs' Motions and in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MERRILL CHARLTON, being duly sworn, deposes and says:

1. I am an assistant attorney in the Legal Division of the Department of Social Services of the City of New York, and submit this affidavit in further support of Defendant Jack R. Goldberg's opposition to plaintiffs' motions and in support of the remaining defendants' motions to dismiss the complaint herein.

2. I have been duly admitted and actively engaged in the practice of law in all courts of record of the State of New York since 1939, and am also a member of the bar of this Court and of the Supreme Court of the United States.

3. On Friday, March 22, 1968, attorney Gilman advised me that a Fair Hearing on the propriety of the discontinu-

ance of public assistance was scheduled to be held for Ruby Sheafe on the morning of Monday, March 25, 1968, before the State Department of Social Services, and he requested my help, which was given, to assure that this Hearing would be held and not adjourned. I have verified that such hearing was held.

4. In my previous affidavit (presently before this Court) sworn to March 14, 1968, I indicated that Ruby Sheafe alone caused the Department to discontinue her grant because she refused to permit collateral visits to her current and former employers by Department representatives to verify her employment earnings record as periodically required under the Social Welfare Law and its implementing provisions of the Department's Manual of Policies governing public assistance, as well as her refusal to furnish the Department authentic medical information establishing her claim that she is physically incapable of full time employment. Thus, the Department was required to discontinue because Ruby Sheafe failed to sustain under the law, her burden of establishing her continuing eligibility and she rejected the Department's offer to assist her in establishing such eligibility. The fact therefore must be stressed that if this plaintiff is genuinely eligible for public assistance, her reinstatement to the rolls lies completely in her hands; and her previous removal therefrom stems entirely from her own conduct, all of which had been told to her (before and since her removal) by the Department's representatives, and I made her attorney Mr. Gilman thoroughly aware thereof.

Supplemental Affidavit of Merrill Charlton

WHEREFORE, I respectfully urge that plaintiffs' motions be denied and that defendants' motions dismissing both complaints herein be granted.

Merrill Charlton

(Sworn to March 25, 1968.)

Affidavit of Samuel Felder in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

SAMUEL FELDER, being duly sworn, deposes and says:

I am counsel to the Department of Social Services of the City of New York, and am submitting this affidavit in response to those allegations in the affidavit of Marianne J. Rosenfield, sworn to March 18, 1968, which attribute statements to me which are inaccurate and misleading.

It is true that I had a telephone conversation with Mrs. Rosenfield. However, at no time during this conversation, which took place after March 1, 1968, did I state, as alleged in paragraph #12 of her affidavit, that the regulations which had been duly promulgated and by their terms, effective March 1, 1968, were not effective or that my Department would not comply with them. What I did say was that the regulations were promulgated without notice to us and we did not learn of their existence until less than a week before the effective date so that we had no opportunity to take all the steps necessary to implement the regulation which provides review hearings for recipients whose grants are about to be suspended or discontinued; that it was virtually impossible for so large a city organization as ours to make the new procedures effectively functional on the spot, particularly since about 10,000 cases monthly would now be affected, and that the administra-

tive complexities are too great, involving as they do widespread promulgation and special training of staff. However, I made it quite clear to Miss Rosenfield that the City had every intention to implement the new regulations and that we are now exerting great efforts in developing plans for as early an implementation as the circumstances will permit.

I further suggested to Miss Rosenfield that to insure against any hardships that might result during the interim before the new procedures became fully operational, that if she should on behalf of her client (Mrs. Fuente) promptly file a request for a hearing before the State Department of Social Services, I would arrange for the continuance of public assistance on an emergency basis and in this way assure such continued assistance until a determination could be had in her case. Miss Rosenfield indicated to me that this was satisfactory to her. I thereupon promptly arranged for Mrs. Fuente's assistance on an emergency basis to be resumed in order that she could have the benefits equal to those provided under the new regulations. The fact that despite the directions given the Welfare Center to continue the full assistance grant, through insufficient understanding of the effect of these new regulations, Mrs. Fuente's semi-monthly grant of $99.87 was paid in three parts on successive days, all of which points up the enormity of our task, and will include not only formulating procedures and guidelines but also assembling and training the staff needed to put the new regulations into operation.

It should be of further interest to this Court to know that Miss Rosenfield's office is aware that we have been working diligently to develop procedures which will forge the spirit and the letter underlying these new regulations into effective tools for furthering the interests of recipients. Recently we submitted drafts of our proposed implementa-

tion procedures to various community action groups, including Mobilization For Youth, Inc., the organization Miss Rosenfield represents, for their views and suggestions thereon; we also met with these groups and explored these matters at length; there appeared to be general agreement among them that the magnitude and complexity of our problems did not lend themselves to quick and easy solutions, and the incomplete functioning of our implementation under the new regulations at this time was not due to the causes suggested by Miss Rosenfield in her affidavit. The fact is that by continuing public assistance in cases where recipients request a Fair Hearing before the State Department of Social Services, we are acting in entire compliance with the spirit and intent of the new regulations pending their successful fulfillment.

Samuel Felder

(Sworn to before me March 25, 1968.)

Supplemental Affidavit of Luis M. Neco in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

LUIS M. NECO, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of J. Lee Rankin, Corporation Counsel of the City of New York and attorney for defendant Jack R. Goldberg, Commissioner of Social Services of the City of New York.

2. I make this affidavit to supplement my affidavit dated April 5, 1968, in which I apprised the Court that the State and City Departments of Social Services were negotiating a substantial revision or replacement of the State Commissioner's pre-suspension administrative review regulation.

3. This office is informed that defendant Goldberg anticipates that said revision or replacement may occur during the week of April 15, 1968.

4. The undersigned will seek to keep the Court advised of further developments relevant to this action.

Luis M. Neco

(Sworn to April 12, 1968.)

Supplemental Affidavit of Joel H. Sachs in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Wyman, Commissioner of the New York State Department of Social Services, Jones Chairman of the State Board of Social Welfare, Adams, Heights, Kimmerer, Galbraith, Johannes, Hopkins, McConville, Hale, Hostein, Klingenstein, Berlinger, Jackson, Lopez and Bernstein, as members of the Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case. I make this supplemental affidavit to apprise this Court of recent developments related to the instant proceedings.

On Thursday, April 25, 1968 at a meeting called at the request of the New York City Department of Social Services and the New York City Corporation Counsel's office, attended by Joseph H. Loucheim, Deputy Commissioner of the New York State Department of Social Services, Felix Infausto, Esq., counsel to the New York State Department of Social Services, Philip Kahaner, Esq., Assistant Attorney General in charge of the Litigation Bureau, Joel H. Sachs, Esq., Assistant Attorney General, Jack R. Goldberg, Commissioner of the City of New York Department of Social Services, Samuel Felder, Esq., counsel to

the New York City Department of Social Services, Norman Redlich, Esq., Executive Assistant Corporation Counsel, John Loflin, Esq., Assistant Corporation Counsel in charge of the Litigation Bureau, and Luis M. Neco, Esq., Assistant Corporation Counsel, and after discussions carried out over a six hour period, it was decided that the New York State Department of Social Services Regulation 351.26 (defendant Wyman's Exhibit "A") presently in effect be repealed and a new Regulation 351.26 be adopted.

On Friday, April 26, 1968 the annexed Regulation 351.26 was promulgated by New York State Department of Social Services Commissioner George K. Wyman. This new Regulation supersedes defendant Wyman's Exhibit "A" which is before the Court at the present time. This new Regulation is to take effect immediately.

WHEREFORE, it is respectfully requested that plaintiff's application for a preliminary injunction, the convening of a three-judge court and an order that the instant matter proceed as a class action be, in all respects, denied.

Joel H. Sachs

(Sworn to April 29, 1968.)

Exhibit Annexed to Foregoing Affidavit

Newly Adopted Section 351.26 of Official Regulation of the New York State Department of Social Services

Pursuant to the provisions of sections 20 and 34 of the Social Services Law, I, George K. Wyman, Commissioner of Social Services, do hereby amend in part, as hereinafter indicated, Part 351 of Article 1 of Subchapter B of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR, effective immediately upon filing with the Secretary of State.

Section 351.26 is hereby REPEALED and a new section to be section 351.26 is hereby added to read as follows:

351.26. Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and

establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the

recommendation, if any, of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or sus-

pension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

Signed: George K. Wyman
Commissioner

Date: April 26, 1968

This is to certify that this is the original of an order of the State Department of Social Services, made on April 26, 1968, amending in part, section 351.26 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18, NYCRR.

Signed: George K. Wyman
Commissioner

Date: April 26, 1968

Opinion No. 34801 of Bryan, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MEMORANDUM

BRYAN, District Judge:

The present suit is one of the growing number in which welfare recipients are challenging the fairness of the procedures by which the system of public assistance is administered. See, e.g., Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), prob. juris. noted, 36 U.S.L. Week 813 (Jan. 15, 1968); Smith v. King, 277 F. Supp. 331 (M.D. Ala. 1967), prob. juris. noted, 36 U.S.L. Week 3297. The eight individual plaintiffs in this consolidated action are all New York City residents whose welfare assistance has been terminated without a prior hearing. They attack the validity of the rules and regulations promulgated by the defendants —the Commissioner of the State Department of Social Services, the individual members of the State Board of Social Welfare, and the Commissioner of the New York City Department of Social Services—which permitted termination of assistance prior to hearing.

The complaint, seeking declaratory and injunctive relief, is based on the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction is alleged under 28 U.S.C. §§1343(3)(4). Plaintiffs have moved for convocation of a three-judge court pursuant to 28 U.S.C. §§2281-84, a preliminary injunction, and a class action order pursuant to Rule 23(c), F.R.C.P. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted, for mootness, and for want of standing to sue.

The individual plaintiffs fall into two groups. Four of them—Kelley, Young, DeJesus and Sheafe—were recipi-

ents of Home Relief pursuant to N.Y. Soc. Welfare Law §§167-65, a state and locally funded program not subject to the requirements of the Social Security Act. At the time this complaint was filed, the state regulations evidently did not require a hearing either prior or subsequent to termination of home relief assistance. On January 16, 1968, however, the defendant State Board amended the regulations concerning fair hearings subsequent to termination and made them applicable to Home Relief recipients. See 18 N.Y.C.R.R. pt. 84.3-.23. In addition, home relief recipients are evidently covered by the new procedure for a limited local review prior to termination, pursuant to Regulation 351.26 of the State Department of Social Services, promulgated April 26, 1968.[1]

The remaining four plaintiffs—McKinney, Frye, Guzman and Lett—were recipients of Aid to Dependent Children. N.Y. Soc. Welfare Law §§343-62. ADC is one of the federally assisted categorical aid programs administered under the Social Security Law, 42 U.S.C. §§601-09 (1964), as amended (Supp. I, 1965). Pursuant to the mandate of the federal statute,[2] 42 U.S.C. §602(a)(4), the state

1. When this suit was commenced no prior hearing of any sort was provided. In response to the present action, and similar actions in other states, the State Department promulgated Regulation 351.26, effective March 1, 1968. This regulation was unacceptable to the City Department. After negotiations between the City and State Department the new regulation, which provides local agencies with two options, was adopted.

2. While §602(a)(4) is not clear as to when a fair hearing must be held, the HEW regulation thereunder implies that a hearing after termination or suspension is sufficient. See HEW, Handbook of Public Assistance Administration pt. IV, §6331. A claim of inconsistency between a state statute or regulation and a federal statute, however, does not warrant convocation of a three-judge court. Swift & Co., Inc. v. Wickham, 382 U.S. 111 (1965). But if the jurisdiction of the three-judge court is otherwise properly invoked, it is free to decide the case on the ground that the state statute conflicts with the federal law, or that the federal regulation is not authorized by the federal statute. See United States v. Constantin, 287 U.S. 378 (1932).

statute provides a fair hearing subsequent to termination. N.Y. Soc. Welfare Law §353. Present recipients of ADC faced with termination would also be entitled to the notice and local review provided by new Regulation 351.26, and the New York City plan implementing that regulation approved by the State Department May 1, 1968.

The plaintiffs' basic claim is that the state cannot, consonant with due process, terminate public assistance without affording the recipient a prior hearing. They point to the cases requiring a hearing at a meaningful point in the administrative process,[3] and argue that the extraordinary hardship worked upon a recipient by loss of aid compels the conclusion that the meaningful point for hearing is prior to termination. See Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967). The defendants apparently agree with this proposition, since, as explained earlier, they have amended the rules to provide for review at the local level prior to termination. In supplementary filed papers, the plaintiffs have challenged the adequacy of the procedures provided by new Regulation 351.26 to satisfy the requirements of due process.

I.

Does the case in its present posture require convocation of a three-judge court? The defendants raise several objections at the outset.

First, they argue that the individual plaintiffs, having failed to invoke the fair hearing procedure after their terminations, have not exhausted their available remedies. While this procedure would only have been available to four of the plaintiffs, in my view exhaustion of a remedy of

3. See Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941); Morgan v. United States, 304 U.S. 1 (1938); Londoner v. Denver, 210 U.S. 373 (1908); compare Armstrong v. Manzo, 380 U.S. 545 (1965); Thorpe v. Housing Authority of Durham, 386 U.S. 670 (1967).

this sort is not required in a case brought under 42 U.S.C. §1983. See Damico v. California, 389 U.S. 416 (1967) (per curiam); McNeese v. Board of Education, 373 U.S. 668 (1963).

Second, defendants urge that the case is moot, based on affidavits showing that most of the plaintiffs are now receiving public assistance on an emergency basis. Judicial determination of questions of this importance cannot thus be evaded and, in any event, dismissal is not appropriate when the individuals purport to represent a class.

Finally, noting that the thrust of plaintiffs' complaint is directed at state and local administrative regulations, defendants argue that a three-judge court is not required under 28 U.S.C. §2281. This claim is not without merit, particularly in view of the traditional reluctance of courts, based on needs of judicial economy, to invoke the three-judge procedure. See United States v. Interstate Commerce Commission, 337 U.S. 426 (1949); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129, 130-31 (2d Cir. 1967). However, where the regulations are of broad applicability, and embody legislative policy on a state-wide basis, three-judge courts have been deemed appropriate. See Oklahoma Gas Co. v. Russell, 261 U.S. 290 (1923); Note, Federal Review of State Welfare Practices, 67 Colum. L. Rev. 84, 106-08 (1967); compare McWood Corp. v. State Corporate Comm'n, 237 F. Supp. 963 (D. N.M. 1965). In my view, a three-judge court is appropriate where, as here, the regulations attacked implement important state social and economic policy.

II.

The remaining question is whether the constitutional issues presented by the complaint, in the present posture of the case, are substantial. Defendants urge that the procedures provided by Regulation 351.26 fully satisfy the requirements of due process and, in essence, meet the

demands of the original complaint. Plaintiffs, on the other hand, claim several deficiencies in the new procedures and to illustrate their objections, contrast the new regulation with the procedures provided upon a fair hearing after termination. Specifically, they complain that the new procedures do not provide for confrontation and cross-examination of witnesses, or for an independent hearing examiner.[4] The rules governing fair hearings, on the other hand, plainly provide for confrontation and cross-examination, and are held before state hearing officers specially employed for this purpose. In short, plaintiffs' demand is for a trial-type hearing prior to termination, rather than a documentary review.

Cases requiring that administrative hearings be held before agency action directly affecting personal well-being becomes final are increasingly common. See, e.g., Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Homer v. Richmond, 292 F.2d 729 (D.C. Cir. 1961). These cases, however, shed little light on the type of hearing required. One test which seems to be evolving requires the court to balance the private right against the government interest to determine the nature of the hearing. See Wasson v. Trowbridge, 382

4. Regulation 351.26 provides local agencies with two options.

Under subdivision (a) the local agency must give seven days written notice before suspension of aid, specifying the reasons for suspension. The recipient is entitled to appear before a local social services official occupying a position superior to the person who approved the suspension, and present oral and written relevant evidence and reasons on his behalf, with the aid of counsel or other representative. The official then reviews the evidence with the recipient and his representative and makes his decision.

Under subdivision (b), the option elected by New York City, the same notice requirements prevail. No oral evidence or witnesses, however, are permitted. The recipient or his representative is only entitled to submit in writing a statement or other evidence demonstrating why his grant should be continued. The local official then reviews the case file, and the statement submitted by the recipient, and makes his determination.

F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961). A trial-type hearing is more often required where the matter to be adjudicated relates to an individual's eligibility under or compliance with established standards, rather than a question of the validity of the standards themselves. See Willner v. Committee on Character, 373 U.S. 96 (1963); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926); 1 Davis, Administrative Law §§7.01-.05 (1958 & Supp. 1965).[5] In resolving questions of a factual nature, it is felt that the traditional safeguards of confrontation and cross-examination are required. Cf. Greene v. McElroy, 360 U.S. 474 (1959).

In my view the question of whether a trial-type hearing is required before termination of welfare benefits presents a substantial constitutional issue. The burden placed upon the state and local governments by having to continue to make payments during the pendency of the hearing and decision is slight and has already been assumed by them under the present regulation. The demand that full hearings would make upon agency manpower and funds is no doubt more substantial. When contrasted, however, with the plight of a recipient cut off from all aid while waiting for a full hearing upon appeal to the state agency, I cannot say that the answer is so clear as to make the issue presented constitutionally insubstantial.

It should also be pointed out that the type of questions presented by the terminations alleged in the complaint appear to be questions of fact going to the eligibility of the recipients for aid under present standards. The com-

5. Where the questions presented raise only issues of law, trial-type hearings are not required. See F.C.C. v. W.J.R., 337 U.S. 265 (1949). Nor is confrontation or cross-examination required where the hearing is deemed investigatory, see Hannah v. Larche, 363 U.S. 420 (1960); Anonymous No. 6 v. Baker, 360 U.S. 287 (1959), or the ruling made is simply advisory. See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933).

plaint does not challenge any of the standards purportedly relied on by the defendants in terminating assistance, but only the application of those standards to the individual plaintiffs. Questions of this sort are customarily resolved by trial-type hearings.

Finally, in three other cases presenting similar issues, three-judge courts have been convoked. See Williams v. Gandy, Civ. No. GC6728 (N.D. Miss. 1967); Wheeler v. Montgomery, Civ. No. 48303 (W.D. Calif. 1967); Laze v. Downing, Civ. No. 7-2089-C-2 (S.D. Iowa 1967). Consequently, I conclude that the issues presented by this complaint are not insubstantial and should be heard by a three-judge court pursuant to 28 U.S.C. §§2281-84.

III.

Plaintiffs have also moved for an order pursuant to Rule 23(c), F.R.C.P., permitting this case to be maintained as a class action. That rule provides that such a determination shall be made "as soon as practicable after the commencement of an action brought as a class action." While it may be that common questions of law and fact are present here, none of the parties has submitted facts from which I could determine the membership of the class, the adequacy of plaintiffs' representation of the class, the question of possible sub-classes, or the type of notice which would be required. Therefore, I conclude that it is not yet practicable to make the determination required by Rule 23(c).

IV.

Plaintiffs also pray for a temporary injunction directing that defendants restore the individual plaintiffs to the welfare rolls and refrain from terminating benefits of other recipients without prior hearings. Since it appears that the individual plaintiffs are presently receiving some bene-

fits, at least on an emergency basis, and in view of the promulgation of the new regulations providing for a form of hearing prior to termination, I do not feel that a temporary injunction is required at this time pending hearing before the full court on the merits.

V.

In accordance with these views, I will notify the Chief Judge of this Circuit that the consolidated action should be heard before a three-judge court pursuant to 28 U.S.C. §§2281-84. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted should also be heard before the full court. Plaintiffs' motion for temporary injunctive relief is denied.

It is so ordered.

Dated: New York, N.Y.
May 17, 1968

Frederick vP. Bryan
United States District Judge

Order of Bryan, D.J., Filed May 28, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

1. These causes, including all applications of the parties for temporary and final relief, will be heard before the court of three judges duly designated herein on June 26, 1968, at 10:30 a.m. in courtroom 1505, United States Court House, Foley Square, New York, N.Y.

2. All motions addressed to the three judge court, including supporting papers and briefs, will be served and filed not later than June 10, 1968.

3. All answering papers and briefs will be served and filed not later than June 17, 1968.

4. Any reply papers or briefs will be served and filed not later than 12:00 o'clock noon on June 24, 1968.

5. The parties will fully comply with Rule 25 of the General Rules of this Court.

It is so ordered.

Dated: New York, N.Y.
May 27, 1968

Frederick vP. Bryan
United States District Judge

Order of Lumbard, C.J., Designating Three-Judge Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Having been notified by the Honorable Frederick vanPelt Bryan, United States District Judge for the Southern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable Frederick vanPelt Bryan, to hear and determine said cause as provided by law: Honorable Wilfred Feinberg, United States Circuit Judge, and Honorable Edward C. Helsan, United States District Judge for the Southern District of New York.

IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard
Chief Judge, United States Court
of Appeals for the Second Circuit

Dated: New York, N. Y.
May 23, 1968

Order of Bryan, D.J., Amending Order Filed May 28, 1968

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The order heretofore entered in these causes dated May 27, 1968, is hereby amended to read as follows:

1. Defendants' motions heretofore made to dismiss the complaints pursuant to Rule 12(b), F.R.C.P., and the motions of defendants and plaintiffs hereinafter referred to, will be heard before the court of three judges, duly designated herein, on June 26, 1968, at 10:30 a.m. in Courtroom 1505, United States Court House, Foley Square, New York, N.Y.

2. Any additional briefs in support of defendants' motions to dismiss the complaints, any motions by defendants for summary judgment on the ground that the procedures provided by statute and regulation are adequate on their face, and briefs and papers in support thereof, and any motions by plaintiffs for discovery, for a determination that these are class actions under Rule 23, F.R.C.P., or for intervention by additional parties plaintiffs, and papers and briefs in support thereof, will be served and filed not later than June 17, 1968.

3. Any answering papers or briefs will be served and filed not later than 12 o'clock noon on June 24, 1968.

4. Pending the hearing by the court of three judges on June 26, 1968, all discovery and inspection by plaintiffs is stayed.

5. The parties will fully comply with Rule 25 of the General Rules of this Court.

It is so ordered.

Dated: New York, N.Y.
June 11, 1968

Frederick vP. Bryan
United States District Judge

Notice of Defendants' Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the complaints in the above entitled consolidated actions, the affidavits of Jack R. Goldberg, sworn to on May 8, 1968 and June 14th 1968, the undersigned will move this Court of three Judges in Courtroom 1505, United States Courthouse, Foley Square, New York, N.Y., on the 26th day of June, 1968 at 10:30 A.M. for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting a summary judgment to defendant Jack R. Goldberg, dismissing the complaint as to him on the basis that the procedures relating to the termination of public assistance provided by statute and regulations are adequate on their face, that there is no genuine issue as to any material fact and that said defendant is entitled to a judgment as a matter of law and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 17, 1968.

Yours &c.,

J. Lee Rankin
Corporation Counsel

By
John J. Loflin
Assistant Corporation Counsel

Notice of Defendants' Motion for Summary Judgment

To:

Hon. Wilfred Feinberg
U. S. Circuit Judge
U. S. Courthouse
Foley Square
New York, N.Y.

Hon. Edward C. McLean
U. S. District Judge
U.S. Courthouse
Foley Square
New York, N.Y.

Hon. Frederick van Pelt Bryan
U. S. District Judge
U. S. Courthouse
Foley Square
New York, N.Y.

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
80 Centre Street
New York, N.Y.

Lee A. Albert, Esq.
Henry A. Freedman, Esq.
Attorneys for Plaintiffs

Affidavit of Jack R. Goldberg in Support of Foregoing Motion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JACK R. GOLDBERG, being duly sworn, deposes and says:

I am the Commissioner of Social Services of the City of New York and one of the defendants in this action. I submit this affidavit to apprise the Court of the present status of New York State Department of Social Services Regulation 351.26. Regulation 351.26, which was effective March 1, 1968 and which could not be implemented for reasons already submitted to this Court, was repealed by the New York State Department of Social Services on April 26, 1968 and a new Regulation 351.26 was promulgated in place thereof. A copy of the new regulation is annexed to these papers and marked Exhibit "A".

In accordance with the option contained in the new Regulation we promptly submitted to the New York State Department of Social Services for its review and approval, a proposed local procedure concerning discontinuance or suspension of grants of public assistance. A copy of the procedure is annexed hereto as Exhibit "B".

On or about May 6, 1968, my office received a letter dated May 1, 1968 from the State Department of Social Services informing us that our local procedure was ap-

proved effective May 1, 1968. A copy of that letter is an nexed as Exhibit "C".

It is my intention to implement the new Regulation by placing the newly approved procedure into operation a the earliest possible moment. Even assuming that we wil not encounter any opposition from local 371, A.F.S.C.M.E. AFL-CIO, which organization has a labor contract coverin the employees who will be designated to serve as reviev officers, I would estimate that approximately three week will be required before the new procedure can become fully operational. Under the Regulation the review officers mus occupy positions superior to those of the supervisors wh approved the proposed discontinuances or suspensions o public assistance. In order to obtain the best qualifie personnel for this task, we will have to draw upon the limited number of supervisory employees in the higher category and train them to perform the function required under the procedure. Their replacements will also have to be trained to assume the duties and responsibilities of the positions left by the designated review officers to prevent serious disruption and dislocations in the on-going operations of the Department. I intend to accelerate every effort toward the effective achievement of the goal of making the new procedure operational as soon as possible.

Jack R. Goldberg, Ed.D

(Sworn to May 8, 1968.)

Affidavit of Jack R. Goldberg in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JACK R. GOLDBERG, being duly sworn, deposes and says:

I am the Commissioner of Social Services of the City of New York and one of the defendants in this action. I submit this affidavit to apprise the Court of the present status of our implementation of the new Regulation 351.26 of the New York State Department of Social Services, which became effective April 26, 1968.

In accordance with the option contained in the new Regulation referred to (Sec. 351.26(b)), this Department submitted to the State Department for its review and approval, a proposed procedure concerning a recipient's right to review in cases of intended discontinuance or suspension of grants of public assistance. On or about May 6, 1968 we received a letter from the State Department of Social Services advising that our local procedure was approved effective May 1, 1968. (A copy of this letter is annexed to my prior affidavit of May 8, 1968 and marked Exhibit C.)

Affidavit of Jack R. Goldberg

I previously informed this Court in my affidavit of May 8, 1968 that I intended to implement the new Regulation by placing the newly approved procedure into operation at the earliest possible moment but for reasons stated I estimated that approximately three weeks would be required before the new procedure could become fully operational.

On or about May 21, 1968, our new procedure (No 68-18 attached) went out to all the Welfare Centers of the Department, and on May 27, 1968 became continuously operational throughout the City.

Jack R. Goldberg

(Sworn to June 14, 1968.)

Exhibit 1 Annexed to Foregoing Affidavit

New Procedure for Clients' Rights of Review

(See Opposite ☞)

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

SUBJECT: CLIENTS' RIGHT OF REVIEW IN CASES OF PROPOSED SUSPENSION OR DISCONTINUANCE OF ASSISTANCE	PROCEDURE NO. 68-18
	May 21, 1968
TO: Administrative Group Case Unit	Classification 34
	Replaces: P 68-15 (34)

Distribution: C

Effective: Immediately

I. INTRODUCTION

A. Purpose: With the approval of the State Department of Social Services this procedure implements the new State policy which insures that the clients' rights are protected in cases where it is proposed that assistance be suspended or discontinued. This new policy in no way limits the client's right to request a Fair Hearing, in accordance with existing policy, and requires that assistance be continued until completion of the administrative review.

B. Program:

1. The State Department of Social Services has promulgated a new regulation which assures the client of the opportunity for a Department review by an employee who occupies a position superior to that of the employee who approved the proposed discontinuance or suspension of assistance. For purposes of this procedure, this employee shall be defined as the Review Officer.

2. In situations, other than those listed below, notification must be sent to the client of the intent to suspend or discontinue assistance seven (7) calendar days prior to the planned effective date of such action.

   a. death of unattached person
   b. admitted to institution (mental, penal, correctional, etc.)
   c. client's request for discontinuance of assistance
   d. client's whereabouts unknown and there is no forwarding address
   e. client has left the State permanently
   f. reclassification as to category

3. Upon receipt of information that the client requests an administrative review, the case shall be forwarded to the Review Officer along with all written material submitted by the client.

4. The Review Officer shall promptly review the case record, the recommendations of the Case Unit and the written material, if any, submitted by the client with his request for a review.

(over)

5. Immediately after such review, the Review Officer shall make an appropriate written determination as to whether or not assistance shall be discontinued, detailing the relevant facts and including all evidence submitted at the time of the review, as well as any reference to applicable provisions of the Social Services Law, Rules of the State Board of Social Welfare and Regulations of the State Department of Social Services, and approved local policy.

6. Based on the determination of the Review Officer, the Case Unit shall take appropriate action (to close or continue assistance) and notify the client of the determination by means of the appropriate letter.

C. Forms Used

	Title	Origin
M-3c (New) 5/13/68	Notice of Intent to Suspend or Discontinue Assistance	Case Unit
M-3d (New) 5/13/68	Notice of Decision after Review to Continue Public Assistance	Case Unit
M-3h (Rev. 5/13/68)	Notice of Discontinuance of Public Assistance	Case Unit
M-3e (New) 5/13/68	Decision after Review to Discontinue Public Assistance	Case Unit

II. DETAILED INSTRUCTIONS

Caseworker 1. Records, in detail, discussion with the client and the reasons for the proposed suspension or discontinuance of assistance, including the appropriate closing code.

" 2. Prepares Form M-3c, "Notice of Intent to Suspend or Discontinue Assistance", in triplicate (two copies to be sent to the client and one copy to be retained in case record). Makes appropriate case record entry.

NOTE: On Form M-3c, the dates entered in Paragraphs 1 and 2 shall be identical.

" 3. Forwards case record and all copies of Form M-3c, together with a return envelope identified with caseload number, to Unit Supervisor.

Unit Supervisor 4. Reviews case record and Form M-3c. If in agreement, signs case record entry and Form M-3c. Arranges for immediate mailing of two copies to the client and retains one copy in case record. Controls Forms M-3c and date of their return on separate Form W-708, headed "Proposed Suspension or Discontinuance of Assistance".

" 5. Reviews Form W-708 daily. If client fails to respond to Form M-3c, within the seven days provided or indicates agreement to have his case closed, instructs Caseworker to prepare the necessary forms for closing action in accordance with current procedure, using Form M-3h.

Unit Supervisor

6. If the client requests a review, makes appropriate entry on Form W-708; immediately forwards the case record with any written documents, relevant to the proposed action, submitted by the client, to the Review Officer.

NOTE: The Case Unit is responsible for all service to the client pending the review and receipt of the determination from the Review Officer either to close the case or continue assistance.

Review Officer

7. Immediately reviews the case record and written material, if any, submitted by the client, and prepares a memorandum, setting forth the relevant facts and his determination to continue or discontinue assistance, including any reference to applicable provisions of the Social Services Law, Rules of the State Board of Social Welfare and Regulations of the State Department of Social Services (see Appendix), and approved local policy.

a. If the determination is that assistance shall be continued, prepares the memorandum, in triplicate. Forwards original copy of memorandum with case record to the appropriate Case Unit; forwards duplicate copy of the memorandum to Center Director; retains third copy for own file.

b. If the determination is that assistance shall be discontinued or suspended, prepares memorandum, in quintuplicate. Retains one copy for own file; forwards original copy of memorandum with case record to the appropriate Case Unit; forwards three copies to the Director's office where one copy shall be retained in file, and two copies forwarded to the Fair Hearings Section, Central Office, one for the Commissioner's file and one for the State Area Office.

Unit Supervisor

8. On receipt of determination of the Review Officer, makes appropriate entry on Form W-708. Forwards case record and all material to the Caseworker for appropriate action and controls to insure prompt action.

Caseworker

9. Takes appropriate action to continue or discontinue assistance; prepares appropriate letter to client with a copy to his attorney or representative, if any, and one copy to be retained in case record; makes case entry detailing action taken; prepares required forms to carry out appropriate action in accordance with current procedure.

(over)

APPENDIX

LEGAL BASIS FOR CLOSING CASE

State Department Regulation 351.26 requires that after the review, the reviewing officer's decision shall include reference to applicable provisions of law, rules of the State Board of Social Welfare, regulations of the State Department of Social Services and approved local policy.

The Social Services Law, Board of Rules and Department regulations give the Commissioner authority upon completion of an investigation to suspend, increase, decrease or revoke a grant in cases where such action is based on the element of need, as follows:

SOCIAL SERVICES LAW

Section 134 - "Such person shall be visited. . . ., in order that assistance or care may be given only in such amount and as long as is necessary. . . ." (All categories)

Section 214 (OAA) - ". . . .the amount and manner of giving assistance may be changed or the assistance may be withdrawn if such official finds that the recipient's circumstances have changed sufficiently to warrant such action. It shall be within the power of the social services official at any time to cancel and revoke assistance for cause, as he may deem proper,. . . ."

Section 286(2) (AB) - "The amount and nature of the assistance and the manner of providing it shall be determined by the social services official with due regard to the conditions existing in each case and in accordance with the regulations of the Department."

Section 303, subdivision (2) (AD) - "The amount and nature of the aid and the manner of providing it shall be determined by the social services officials with due regard to the conditions existing in the case in accordance with the provisions of this title, or other provisions of this chapter, the rules of the board and the regulations of the Department."

Section 350, subdivision 2 (ADC) - "allowances (a) shall not be granted for a period of longer than that prescribed by the rules of the board and regulations of the Department, subject to renewal from time to time.

(b) May be increased, decreased or revoked at any time."

Section 365a (MA) - "The amount, nature and manner of providing medical assistance for needy persons shall be determined by the social services officials. . . .in accordance with the local medical plan, the provision of the title (11), the rules of the board and regulations of the Department."

BOARD RULE

82.1(a)(1) - "Public assistance and care shall be granted only so long, and in such form and amount, as is necessitated by the needs of the recipient in the light of his resources." (All categories)

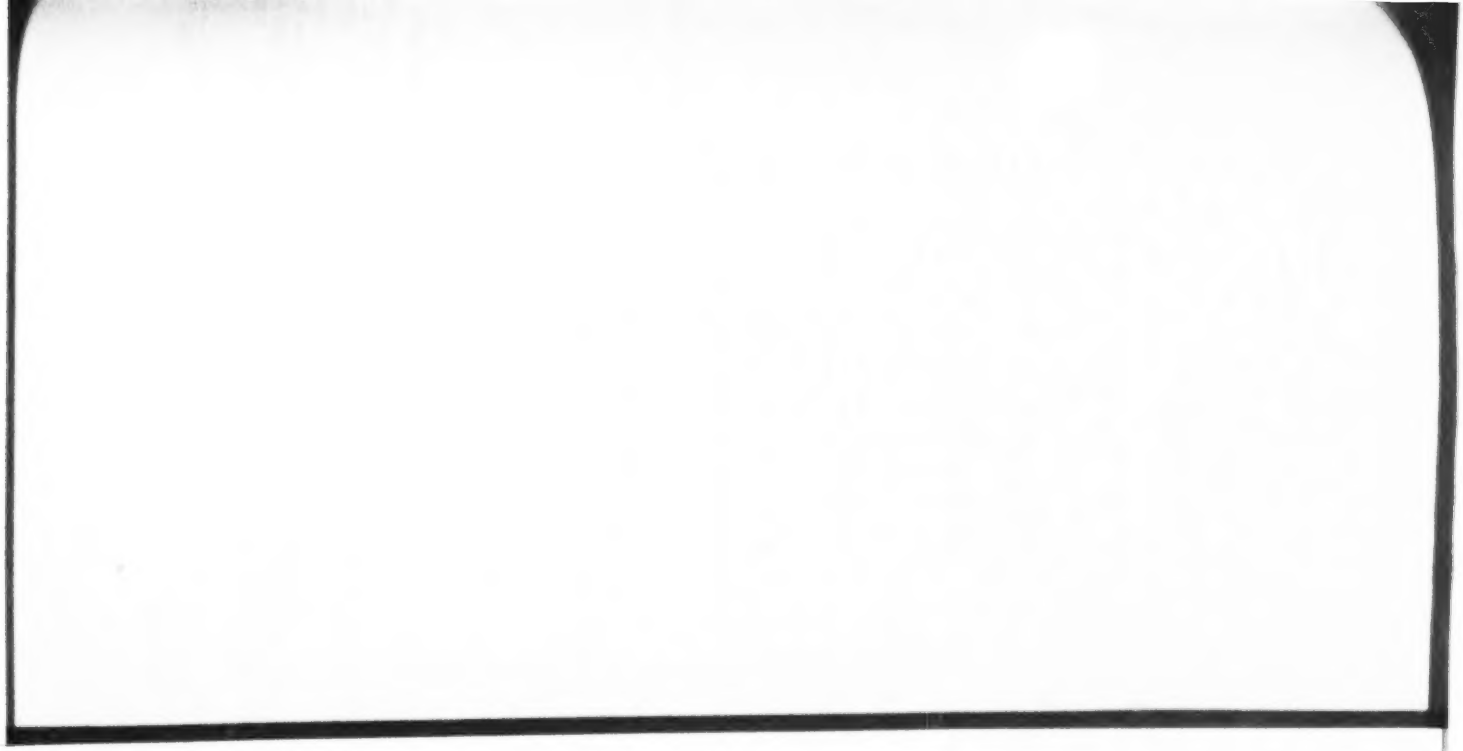
STATE DEPARTMENT REGULATIONS

351.22(c) - "When an agency verifies ineligibility or a change in degree of need, action shall be taken immediately to reduce, increase, or discontinue the grant for the next payment period possible under existing payment procedure." (All categories)

For those closings where there is ineligibility for reasons other than need, in addition to the foregoing, the following references to law, rule or regulation may be included:

Closing Codes		
40-47	Social Services Law 285 State Department Regulation 368.2(i)	AB
	Social Services Law 302 State Department Regulation 368.2(j)	AD
	Social Services Law 349 Board Rule 80.1 State Department Regulations 369.2 369.3	ADC and T-ADC
	"Policies Governing the Administration of Public Assistance", Section 32	

Closing Codes	
48 and 49	Social Services Law 131 (4) State Department Regulations 351.3 and 369.2 (7)
50	Social Services Law 131 (4) State Department Regulations 251.3 and 368.2
53	Social Services Law 321, 360 State Department Regulation 352.8 "Policies Governing the Administration of Public Assistance", Chapter VI
54	Social Services Law 134a State Department Regulation 351.7
55	State Department Regulation 351.2 "Policies Governing the Administration of Public Assistance", Section 165
57	Social Services Law 131(5b), 350b State Department Regulations 351.3, 369.2(7)
58	State Department Regulation 351.1
59	Social Services Law 352 State Department Regulation 369.1 (b)
99	Contact Legal Division
56	Where there is a continuing need, there is no legal basis for closing a case for misuse of funds. State Department Regulation 352.5 (n) (1) provides for duplication of a grant in whole or part when the original check or proceeds were allegedly lost, stolen or diverted to other purposes, when the health and safety of the recipient would be threatened by a failure to replace. Consideration should be given to restriction of a grant, or transfer to some other form of assistance or care.



The City of New York

DEPARTMENT OF SOCIAL SERVICES

Center:

Address:

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE
(Prepare in Triplicate)

Case Number

This is to advise you that this Department intends to ☐ SUSPEND ☐ DISCONTINUE your public assistance grant on _____, for the following reasons:

If you feel that your public assistance grant should not be suspended or discontinued, you may request a review of your record by a Review Officer on or before _____. You may also submit any statement or document which may establish your need for public assistance. You have the right to submit this written material through an attorney or any representative of your choosing.

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No. 1: ☐ I REQUEST A REVIEW Box No. 2: ☐ I DO NOT REQUEST A REVIEW

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

If, after this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

Unit Supervisor Date Caseload No.

Form 3c* (face)
5/13/68

W-3c* (reverse)
67

AVISO DE INTENCION DE SUSPENDER O CANCELAR ASISTENCIA PUBLICA

_____
Caso Numero

presente es para informarle que este Departamento intenta ☐ SUSPENDER ☐ CANCELAR su
gnacion de asistencia publica a partir de _____, por las razones
uientes:

Ud. cree que su asignacion de Asistencia Publica no debe ser suspendida o cancelada, Ud puede
licitar una revision de su caso por un Funcionario Revisador, en o antes de _____.
sted puede presentar tambien cualquier declaracion o documento que pueda demostrar su necesidad
recibir asistencia publica. Usted tiene el derecho de presentar esta declaracion escrita o documento
traves de un Abogado o cualquier Apoderado que usted selecciones.

Ud. desea una revision, sirvase marcar con una X en la casilla senalada con el numero Uno abajo.
i no desea dicha revision, sirvase marcar con una X en la casilla numero Dos. Si Ud. no contesta esta
municacion, se presumira que Ud. esta de acuerdo con la decision que este Departamento se propone
doptar.

Casilla Numero 1: ☐ YO SOLICITO UNA REVISION Casilla Numero 2: ☐ YO NO SOLICITO UNA REVISION

Sirvase devolver una copia de esta carta en el sobre adjunto y guarde la otra copia para su archivo.

Si, despues de la revision antes mencionada, Ud. todavia no esta de acuerdo con la decision que se
adopte, Ud. puede solicitar, verbalmente o por escrito, una Audiencia en Justicia (Fair Hearing),
comunicandose con el Departamento de Servicios Sociales del Estado, en el 270 Broadway, New York,
N.Y. 10007, Telefono numero 488-6550.

Supervisor de Unidad Fecha Caseload Numero

DEPARTMENT OF SOCIAL SERVICES
Center
Address

NOTICE OF DECISION, AFTER REVIEW, TO CONTINUE PUBLIC ASSISTANCE

Case Number

After careful consideration of all the factors and documents you presented, we are in agreement that you are still eligible to receive public assistance.

Please inform your Caseworker of any change in your circumstances that affects your need for assistance.

Unit Supervisor | Date | Caseload No.

AVISO AL CLIENTE DE DECISION PARA CONTINUAR RECIBIENDO ASISTENCIA

Despues de cuidadosa consideracion de todos los datos y documentos presentados por Ud., hemos llegado a la conclusion de que Ud. continua siendo elegible para recibir asistencia publica.

Sirvase informar a su trabajador de cualquier cambio en las circunstancias que puedan afectar su necesidad para recibir asistencia publica.

Form M-3d*
5/13/68



DEPARTMENT OF SOCIAL SERVICES
Center
Address

NOTICE OF DISCONTINUANCE OF PUBLIC ASSISTANCE
(Prepare in Duplicate)

Case Number

Our investigation shows that effective immediately you are not eligible to receive

for the following reasons:

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

You will soon receive information concerning your eligibility for continued assistance under the Medical Assistance Program as provided by the New York State Medicaid Program.

Unit Supervisor | Date | Caseload No.

Form M-3h* (face)
Rev. 5/13/68

Form M-3h° (reverse)
Rev. 5/13/68

AVISO DE CANCELACION DE ASISTENCIA PUBLICA

_____
Caso Numero

Nuestra investigacion demuestra que con efecto inmediato Ud. no es elegible para recibir_____

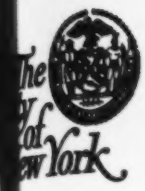
por las siguientes razones:

Usted puede revisar el folleto que le fue dado a Ud. al momento de su solicitud. En° el se explican las condiciones por las cuales se concede este tipo de asistencia publica, asi como sus derechos a la apelacion de esta decision.

Si Ud. no esta de acuerdo con esta decision, Ud. puede solicitar por escrito o verbalmente una Audiencia en Justicia (Fair Hearing), comunicandose con el Departamento de Servicios Sociales del Estado, 270 Broadway, New York, N.Y. 10007, Telefono numero 488-6550.

Pronto recibira Ud. informacion concerniente a su elegibilidad para continuar recibiendo asistencia bajo el Programa de Asistencia Medica, tal como se facilita por el Programa de Ayuda Medica (Medicaid) del Estado de Nueva York.

_____ _____ _____
Supervisor de Unidad Fecha Caseload Numero



DEPARTMENT OF SOCIAL SERVICES

Center:
Address:

NOTICE OF DECISION, AFTER REVIEW, TO DISCONTINUE PUBLIC ASSISTANCE

Case Number

After careful consideration by a Review Officer of all the factors and documents you presented, it has been decided that effective immediately you are not eligible to receive _____ for the following reasons:

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

You will soon receive information concerning your eligibility for continued assistance under the Medical Assistance Program as provided by the New York State Medicaid Program.

Unit Supervisor | Date | Caseload No.

Form M-3a* (face)
5/13/68

Form M-3a* (reverse)
5/15/68

NOTICIA DE CANCELACION DE ASISTENCIA PUBLICA DESPUES DE LA REVISION

_____
Caso Numero

Despues de cuidadosa consideracion por un funcionario revisador de todos los datos y documentos presentados por Ud., se ha decidido que con efecto inmediato Ud. no es elegible para recibir _____por las siguientes razones:

Usted puede revisar el folleto que le fue dado a Ud. al momento de su solicitud. En el se explican las condiciones por las cuales se concede este tipo de asistencia publica, asi como sus derechos a la apelacion de esta decision.

Si Ud. no esta de acuerdo con esta decision, Ud. puede solicitar por escrito o verbalmente una Audiencia en Justicia (Fair Hearing), comunicandose con el Departamento de Servicios Sociales del Estado, 270 Broadway, New York, N.Y. 10007, Telefono numero 488-6550.

Pronto recibira Ud. informacion concerniente a su elegibilidad para continuar recibiendo asistencia bajo el Programa de Asistencia Medica, tal como se facilita por el Programa de Ayuda Medica (Medicaid) del Estado de Nueva York.

_____ _____ _____
Supervisor de Unidad Fecha Caseload Numero

Notice of Motion of Defendants George K. Wyman *et al.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the complaints in the consolidated actions, dated the 29th day of January, 1968 and the 29th day of February, 1968, the annexed affidavit of Joel H. Sachs, and accompanying exhibits, dated the 14th day of June, 1968, and defendants' memorandum of law, dated the 14th day of June, 1968, the undersigned will move before a three-judge court convened pursuant to 28 U.S.C. §2281 *et seq.* at a Motion Term thereof, in Room 1505, United States Courthouse, Foley Square, City of New York on the 26th day of June, 1968 at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment to the defendants, Wyman and the New York State Board of Social Welfare upon the ground that the Rules and Regulations of the New York State Department of Social Services concerning the procedures to be followed when a welfare recipient's public assistance is about to be terminated are constitutional on their face and fully afford the welfare

recipient due process of law and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 14, 1968

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
Wyman and the New York
State Board of Social Welfare

To:

Harold Rothwax, Esq.

Shyleur Barrack, Esq.

Martin Garbus, Esq.

Harold Rothwax, Esq.

Affidavit of Joel H. Sachs in Support of Foregoing Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Wyman, Commissioner of the New York State Department of Social Services, Jones, Chairman of the State Board of Social Welfare, Adams, Height, Kimmerer, Galbraith, Johannes, Hopkins, McConville, Hale, Hostein, Klingenstein, Berlinger, Jackson, Lopez and Bernstein, as members of the Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case. I make this affidavit in support of above-named defendants' motion for summary judgment upon the ground that the provisions set forth in the Rules and Regulations of the New York State Department of Social Services concerning the procedures to be followed when a welfare recipient's public assistance is about to be terminated are constitutional on their face and fully afford the welfare recipient due process of law.

This action, commenced by attorneys for the American Civil Liberties Union, Mobilization For Youth and the New York Legal Aid Society is a "test case" challenging the constitutionality of several provisions of the New York

Social Welfare Law and the official compilation of Codes, Rules and Regulations of the State of New York. It is one of a series of actions which have been commenced by these and related organizations throughout the United States attacking state welfare law provisions as to the procedures to be followed when a welfare recipient's assistance is suspended or discontinued.

At the time plaintiffs' action was commenced, the defendants concede that the New York State Social Services Law did not give welfare recipients notification of their suspension or termination prior to such suspension or termination, nor was a hearing authorized to be conducted prior to the date of discontinuance. (However, at that time, Rules 84.2 to 84.23 of the State Board of Social Welfare did and still do give any welfare recipient who has been suspended or discontinued from welfare the right to ask for a "fair hearing" to review his suspension or termination.)

Subsequent to the commencement of this action, the New York Department of Social Services, after examining plaintiffs' complaint and supporting papers and after conferring with the Welfare Department in the State of California (where a similar action had recently been commenced in the federal courts), amended its regulations concerning the procedure to be followed when a welfare recipient's assistance is about to be discontinued or suspended (as the Welfare Department in California had done previously).

The new Regulation 351.26 providing for prior notice and an "administrative hearing" before termination of public assistance was originally promulgated on February 15, 1968 and was made effective as of March 1, 1968. Subsequent to this date, the New York City Department of Social Services, the largest welfare agency in the State of New York, informed this Court, as well as the New York State Department of Social Services, that the administra-

tion of the new Regulation within the City of New York was proving a difficult task due to the increased personnel, time and expense which would be involved in carrying out the provisions of the new Regulation.

Thereafter, on April 25, 1968, at a meeting called at the request of the New York City Department of Social Services and the New York City Corporation Counsel's office, attended by Joseph H. Loucheim, Deputy Commissioner of the New York State Department of Social Services, Felix Infausto, Esq., counsel to the New York State Department of Social Services, Philip Kahaner, Esq., Assistant Attorney General in charge of the Litigation Bureau, Joel H. Sachs, Esq., Assistant Attorney General, Jack R. Goldberg, Commissioner of the City of New York Department of Social Services, Samuel Felder, Esq., counsel to the New York City Department of Social Services, Norman Redlich, Esq., Executive Assistant Corporation Counsel, John Loftin, Esq., Assistant Corporation Counsel in charge of the Litigation Bureau, and Luis M. Neco, Esq., Assistant Corporation Counsel, and after discussions that extended over a six hour period, it was decided by all concerned that the New York State Department of Social Services Regulation 351.26, presently in effect, be repealed and a new Regulation 351.26 be adopted. On April 26, 1968, the annexed Regulation 351.26 (Exhibit "A") was promulgated by the New York State Department of Social Services Commissioner George K. Wyman. This Regulation is now in effect.

The newly adopted Regulation 351.26 of the Official Regulations of the New York State Department of Social Services provides local agencies with two options. Under subdivision (a), it is provided that before a recipient's welfare payment is discontinued or suspended, the recipient is notified in advance of the proposed discontinuance or suspension along with the reasons therefor. The notice advises the recipient that if he so desires, he may appear for a re-

view of this determination, with the assistance of an attorney or other representative, at which time he will be afforded an opportunity to present such written or oral evidence and the reasons that the recipient may have to demonstrate why his grant should not be discontinued or suspended. Until a decision is made by the welfare official, who must occupy a position superior to that of the supervisor who approved the proposed discontinuance or suspension, assistance to the welfare recipient is continued.

Under subdivision (b), the same procedures prevail with the exception that, instead of appearing personally before the welfare official, the applicant whose assistance is about to be terminated may present a written statement or other evidence to demonstrate why his grant should not be discontinued or suspended. In all other respects, the method of operation under subdivisions (a) and (b) are identical. Hence, plaintiffs' claim that welfare payments may be suspended or discontinued without prior notification or hearing no longer has any merit.

In addition, new Rules of the New York State Board of Social Welfare have recently been adopted (see Exhibit "B") which extend the "fair hearing" provisions to all welfare recipients whose assistance has already been discontinued and streamline the fair hearing requirements. All welfare recipients are now notified of the right to a fair hearing. The hearing is held within ten working days from the date the request is received by the Department in cases involving discontinuance or suspension of assistance. The recipient is notified of his rights to be represented, by counsel, to testify, to present documentary evidence and to examine opposing witnesses and evidence. It is required that a decision be issued as promptly as feasible but not later than 12 working days from the close of the hearing. If the recipient is successful in presenting his case, the local welfare agency may be ordered to reimburse the recipient

for any payments lost as well as to restore him to the welfare rolls.

Taken together, the new Regulations and Rules conclusively demonstrate that plaintiffs' claim as to the unconstitutionality of the procedures which the New York State Department of Welfare follows when a recipient's aid is suspended or terminated, is utterly without merit. The current Regulations now provide that welfare recipients are to be notified before their assistance is discontinued and have a right to an "administrative hearing" before the termination date. In addition, the Rules which provide for a "fair hearing" by the state agency after the discontinuance of assistance by the local agency thus give welfare recipients a review of the local agency's determination. Therefore, the adoption of the new Regulations has rendered plaintiffs' original complaint moot and the renewal of their objections to the current Regulations specious.

Mention should be made of a recent decision of a three-judge court convened in the Northern District of California in the case of *Wheeler* v. *Montgomery* (No. 40383). In that case, plaintiff attacked the welfare law of the State of California on the ground that there was no notice and opportunity for a hearing prior to the termination of public assistance. In response to the institution of this action, the California Department of Social Welfare adopted new Regulations which provided an "informal conference" with the recipient before a final decision as to termination of public assistance was made. This new Regulation is in addition to the California "fair hearing" provisions which were already in effect and are similar to New York State's "fair hearing" provisions.

Thereafter, as in the instant matter, plaintiff again attacked the "informal conference" on the grounds that a) the conference should not be before the local welfare of-

ficial since he can not be impartial and; b) and that confrontation and cross-examination of witnesses were not required. The Court rejected these contentions and found that the "informal conference" prior to the termination of public assistance, taken together with the "fair hearing" held after the termination of public assistance, did comply with the due process clause of the Constitution. A copy of the opinion of the three-judge court, dated April 17, 1968 is annexed hereto as Exhibit "C". Since the Rules and Regulations of the New York State Department of Social Services go well beyond the California Regulations in that New York gives a seven day notice period prior to termination, whereas California gives only three days, in that under subdivision (a) a New York recipient may appear at the conference with an attorney or other representative, whereas in California only the recipient may attend the conference, in that under subdivision (b) a written record is made of the New York welfare recipient's objections, whereas in California there is merely an informal oral conference and in that the review officer in New York is a supervisory welfare official, whereas in California he may only be a case worker, the New York Regulations should be upheld.

Any contention that the official who is to preside at the "administrative hearing" lacks the neutrality and detachment required by the due process clause is without merit. Plaintiffs contend that a hearing officer employed by the local welfare agency cannot be an impartial fact-finder. In numerous State administrative hearings such as ones conducted by the New York State Department of Motor Vehicles, the New York State Workmen's Compensation Board and the New York State Labor Relations Board, the hearing officers who conduct such hearings are employed by the administrative agency involved. In any event, plaintiffs' objection to the alleged bias of the hearing officer in welfare cases is not a constitutional issue, but

like all allegations of bias on the part of a Court or hearing officer, are subject to review by the appellate courts.

Plaintiffs likewise urge that the referee who presides at the hearing prior to termination be a state welfare official rather than a city welfare official. However, since each local welfare program is funded in large measure by the State, there is no basis to assume that a state referee will be any more impartial than a city official. On the other hand, a city referee who has first-hand knowledge of the welfare system in his vicinity and is able to confer directly with the officials of the local welfare agency involved, is in a better position to pass upon a recipient's objections to proposed discontinuance than is a state referee. Furthermore, if a recipient's assistance is discontinued, the entire matter will eventually come before a state referee pursuant to the fair hearing procedures set forth in defendants' Exhibit "B".

Similarly, plaintiffs' contention that the absence of confrontation and cross-examination at the "administrative hearing" is unconstitutional, lacks merit. As will be more fully set forth in the defendants' accompanying memorandum of law, the due process clause does not necessarily require confrontation and cross-examination of witnesses in all proceedings as long as there is a meaningful opportunity to be heard. Under the present Regulations (Exhibit "A") the recipient does have a meaningful opportunity to present his objections to the proposed discontinuance of assistance. Furthermore, the fair hearing rules (Defendants' Exhibit "B") specifically reserve to the welfare recipient the right of confrontation and cross-examination. Hence, the Court should find, as did the three-judge court in *Wheeler* v. *Montgomery, supra,* that plaintiffs' claim as to lack of cross-examination and confrontation at the "administrative hearing" is not jurisdictionally fatal.

In short, now that the State of New York and the City of New York have adopted procedures which give to the plaintiffs precisely the relief they have requested, plaintiffs are now attempting to dictate to the State of New York and the City of New York the type and manner of conducting hearings prior to the termination of public assistance. They also for the first time seem to be attacking the "fair hearing" itself although there is no mention of this in the complaint. As will be set forth in the accompanying memorandum of law, it is well established that as long as the Rules and Regulations of the State of New York and the City of New York provide for adequate notice and opportunity to be heard prior to the termination of public assistance, the requirements of the due process clause are satisfied. Therefore, plaintiffs' challenge to the new regulations must fail.

WHEREFORE, defendants' motion for summary judgment should be granted.

Joel H. Sachs

(Sworn to June 14, 1968.)

Exhibit A Annexed to Foregoing Affidavit

Newly Adopted Section 351.26 of Official Regulations of the New York State Department of Social Services

(Same as exhibit annexed to affidavit of Joel Sachs printed herein at page 127a.)

Exhibit B Annexed to Foregoing Affidavit

Resolution of The New York State Board of Social Welfare Dated January 16, 1968

(See Opposite ☞)

RESOLUTION

of

The New York State Board of Social Welfare
January 16, 1968

WHEREAS, a complete review of the Department's fair hearing procedure has been undertaken by the Board and the Department; and

WHEREAS, as a result of such review, proposed rules of the Board relating to fair hearings were developed which were intended to adequately protect the rights of applicants for and recipients of public assistance; and

WHEREAS, notice was given at the July meeting of the Board, in accordance with Article VIII of the by-laws, of intent to move, at the September meeting of the Board, amendment of Part 84 of the Rules of the Board, to add twenty-two proposed new sections thereto, subject to such revisions as might be recommended as a result of the public hearing or hearings to be held by the Rules Committee; and

WHEREAS, public hearings relating to such proposed rules were held by the Rules Committee on July 21 and 22, 1967 in the City of New York and on August 9, 1967 in the City of Rochester; and

WHEREAS, such proposed rules have been revised as deemed necessary and appropriate in consequence of such public hearings and of further consideration thereof by the Rules Committee; and

WHEREAS, the Department and the Rules Committee of the Board recommend that such proposed rules as so revised be adopted by the Board; and

WHEREAS, notice was given at the November meeting of the Board, in accordance with Article VIII of the by-laws of intent to move, at the December meeting of the Board, such resolution amending the Rules of the Board to accomplish such purpose; and

WHEREAS, the New York Public Welfare Association requested that action on such resolution be deferred; and

WHEREAS, in response to the request of said New York Public Welfare Association the Board postponed action on said resolution to the January meeting of the Board; therefore.

PURSUANT to the authority vested in the State Board of Social Welfare by Section 2 of Article XVII of the New York State Constitution and Sections 17 and 18 of the Social Services Law, it is

RESOLVED, that the Official Rules of the State Board of Social Welfare, being Chapter I of Title 18, NYCRR, be and hereby are amended in the following respects, effective March 1, 1968, except that no provision of these amendments shall apply to Fair Hearings or requests therefor pending on March 1, 1968.

Part 84 is hereby amended by adding thereto twenty-two new sections, to be 84.2 through 84.23 inclusive, to read as follows:

(See annexed)

84.2. Definitions. (a) Appellant. An applicant or recipient who requests a fair hearing shall be termed an appellant.

(b) Board. Board means the State Board of Social Welfare.

(c) Commissioner. Commissioner means the State Commissioner of Social Services.

(d) Department. Department means the State Department of Social Services.

(e) Fair Hearing. Fair hearing is the procedure by which an applicant for or recipient of public assistance may appeal to the Commissioner from certain decisions or actions of a social services official and have a hearing thereon.

(f) Hearing Officer. Hearing officer means an attorney who is employed by the Department exclusively to conduct hearings for the Commissioner.

(g) Parties. The parties to a fair hearing shall be the appellant and the social services official whose decision or action is being reviewed.

(h) Social Services Official. Social services official means the county, city or town official responsible for the administration of public assistance and care. The term shall also include the Director of the Bureau of Mental Health Affairs or the head of any other bureau of the Department to which is assigned responsibility for furnishing public assistance and care to persons in Family Care on conditional release from an institution in the State Department of Mental Hygiene in accordance with the provisions of section 138-a of the Social Services Law and responsibility for furnishing medical assistance for the needy to eligible persons who are sixty-five years of age or older who are patients in state hospitals for the mentally disabled or for the treatment of tuberculosis in accordance with the provisions of subdivision 2 of section 365 of the Social Services Law.

84.3. Right to a fair hearing. The following persons shall be entitled to a fair hearing:

(a) Applicants for or recipients of Aid to Dependent Children, Aid to the Aged, Blind or Disabled, Medical Assistance for Needy Persons, Home Relief or Veterans Assistance on the following grounds:

(1) Denial of assistance,

(2) Failure to determine the applicant's eligibility and, if found eligible, to grant or authorize assistance within thirty days from the date his application therefor was made,

(3) Inadequacy in amount or manner of payment of assistance,

(4) Discontinuance or suspension of assistance, in whole or in part.



(b) Recipient of Aid to Dependent Children or Home Relief who is dissatisfied in relation to assignment in a federal Economic Opportunity Act Title V work experience and training program.

84.4. Informing applicants and recipients of right to fair hearing. Each social services official shall inform applicants and recipients in writing, and orally whenever practicable, of their rights with reference to fair hearings and the method by which a fair hearing may be obtained. Applicants shall be so informed when they apply for assistance and recipients shall be so informed whenever the social services official makes any decision adversely affecting their receipt of assistance or the amount thereof.

84.5. How request for fair hearing is made. Any clear written or oral communication made to the Department by or on behalf of an applicant or recipient requesting review of a social services official's decision, action or failure to act shall constitute a request for a fair hearing if made within sixty days after the action or failure to act complained of.

84.6. When hearing to be held. The hearing shall be held promptly and in any event within ten working days from the date the request is received by the Department in cases involving discontinuance or suspension of assistance and within thirty-three working days from the date the request is received by the Department in all other cases.

84.7. Time and place of hearing. The hearing shall be held at a time and place convenient to the parties as far as practicable, and, if requested, necessary transportation for the appellant and his representative and witnesses, and other costs and expenditures reasonably related to the hearing, shall be provided by the social services official.

84.8. Notice of hearing. At least five working days prior to the date of the hearing in cases involving discontinuance or suspension of assistance and at least ten working days prior to the date of the hearing in all other cases, written notice thereof shall be sent to the parties and their representatives. The notice to the parties shall inform them:

(a) Of the date and place of the hearing;

(b) Of the appellant's rights with respect to transportation and other costs and expenditures;

(c) Of the name and address of the hearing officer who will conduct the hearing;

(d) Of the issues which are to be the subject of the hearing;

(e) Of the manner in which the hearing will be conducted;

(f) Of the right of each party to be represented, to testify, to produce witnesses, to present documentary evidence and to examine opposing witnesses and evidence;

(g) That the time and place of the hearing are subject to change if inconvenient.

84.9. Examination of documents before hearing. Opportunity shall be afforded the appellant or his attorney, on five working days' written request, to examine copies of documentary evidence in the possession of the social services official which the social services official plans to introduce at the hearing, but such documentary evidence need not be produced more than five working days prior to the hearing.

84.10. Hearing Officer. The hearing shall be conducted by an impartial Hearing Officer.

84.11. Powers of Hearing Officer. The Hearing Officer shall have all the powers conferred by law and regulations of the Department to require attendance of witnesses and the production of books and records, and to administer oaths and to take testimony.

84.12. Who may be present at hearing. The appellant, his representative (who may be an attorney or other person representing him), counsel or other representatives of the social services official, witnesses of both parties and any who may be called by the hearing officer, and representatives of the Department may be present at the hearing, together with such other persons as may be admitted by the Hearing Officer in his discretion with the consent of the appellant.

84.13. Conduct of hearing - Rights of parties. (a) The Hearing Officer shall preside. He shall make an opening statement describing the nature of the proceeding, the issues and the manner in which the hearing will be conducted.

(b) Technical rules of evidence followed in a court of law shall not apply, but evidence must be relevant and material.

(c) Each party has a right to be represented by counsel, or other representative, to testify, to produce witnesses to testify, to offer documentary evidence, to cross-examine opposing witnesses, to offer evidence in rebuttal and to examine any documentary evidence offered by the other party.

(d) The hearing may be adjourned by the Hearing Officer for good cause on his own motion or at the request of either party.

(e) A verbatim record of the hearing shall be made.

84.14. Examination of record after hearing. The record of the hearing shall be confidential, but it may be examined by either party.

84.15. Decision after hearing. (a) The fair hearing decision shall be made and issued by the Commissioner on the basis of the hearing record. It shall be issued as promptly as feasible and not later than twelve working days from the close of the hearing; but such time may be extended with the consent of the parties. The decision shall describe the issues, recite the relevant facts, the pertinent provisions of law, Board Rule, Department Regulation and State approved local policy provisions, make appropriate findings, determine the issues, state the reasons for the determinations, and, when appropriate, direct specific action by the social services official.

(b) A copy of the decision shall be sent to each of the parties.

84.16. Notification of right to judicial review. In the letter transmitting the decision, clear reference shall be made to availability of judicial review.

84.17. Direction relative to similar cases. When a fair hearing decision indicates that the social services official has misapplied provisions of law, Board Rule, Department Regulation, or such official's own State approved policy, the Commissioner's letter transmitting such decision to such official shall contain a direction to such official to review other cases with similar facts for conformity with the principles and findings in the decision.

84.18. Decision without hearing. (a) The appellant shall have the option to request that his appeal from a social services official's determination, action, or failure to act be decided by the Commissioner without a hearing. In such cases, opportunity shall be afforded each party to submit written evidence and to review and comment on the evidence submitted by the other party.

(b) If at any stage of an appeal from a social services official's action or failure to act, it clearly appears to the Commissioner that the social services official's action or failure to act is contrary to law, Board Rule, Department Regulation or the social services official's own State approved policy, he may issue a decision directing the social services official to perform specific actions for the benefit of the appellant.

84.19. Compliance with decision. When a decision of the Commissioner (whether made after or without a hearing) directs a social services official to perform specific actions, such official shall comply promptly with such directions and make a report thereof to the Department within thirty days after receipt of the decision.

84.20. Compliance with direction relative to similar cases. When a direction has been given to a social services official to correct misapplication of law, Board Rule, Department Regulation or such official's own State approved policy in all cases similar to the one in which a decision has been issued, such official shall report the actions he has taken to comply with such direction to the Department within thirty days after receipt of the direction. The social services official shall make such additional reports as the Department may require.

84.21. Need for revision of Board Rule and Department Regulation indicated by appeals and fair hearings. When, as a result of appeals and fair hearings, there are indications that provisions of Board Rule or Department Regulation or both may be inadequate, review of such provisions shall be promptly initiated by the Department, which shall make appropriate periodic reports to the Board on the issues raised by hearings and the results thereof.

84.22. Local procedure for consideration of complaints. Nothing in these Rules shall be construed to restrict or limit the right of any social services official to establish and maintain a local, internal procedure for consideration and disposition of complaints by applicants for or recipients of public assistance or other benefits, provided that such procedure shall not be conducted or used so as to inhibit the exercise of any of the rights to a fair hearing granted under these Rules.

84.23. Application of Rules to Cases for which Department is Responsible. These rules shall apply to cases for which the Department is responsible for furnishing public assistance and care pursuant to the provisions of section 138-a and subdivision 2 of section 365 of the Social Services Law. In such cases the reports required to be made to the Department by sections 84.19 and 84.20 of these rules shall be made to the Commissioner or any Deputy Commissioner designated by him.

Exhibit C Annexed to Foregoing Affidavit

Memorandum Opinion of the United States District Court for the Northern District of California in *Mae Wheeler* v. *John Montgomery, et al.*

(See Opposite ☞)

ORIGINAL
FILED

APR 19 1968

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAE WHEELER, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

JOHN MONTGOMERY, et al.,

Defendants.

No. 48303

MEMORANDUM OPINION AND
ORDER DISMISSING ACTION

This is an action for declaratory and injunctive relief. The facts concerning the named plaintiff -- Mae Wheeler -- are essentially as follows: The county welfare agency received a phone call which informed the county that Mrs. Wheeler had received the proceeds of her deceased son's insurance policy and had transferred the money to her grandson. The county determined that Mrs. Wheeler was therefore ineligible for continued welfare (Old Age Security [O.A.S.]) assistance and terminated her aid without affording her a hearing on the alleged facts prior to termination. On December 20, 1967, Judge Alfonso J. Zirpoli, the single judge to whom the application for a temporary restraining order was originally addressed, signed his memorandum opinion and entered various orders. He found the action to

necessitate the convening of a three judge court and found a class action appropriate.

The parties have submitted extensive briefs and exhibits and the matter was submitted to the three judges on April 12, 1968, following oral argument.

With respect to the named plaintiff -- Mae Wheeler -- she has now been afforded a "fair hearing" and has been found eligible for continued O.A.S. assistance. Furthermore, the claim originally pressed by plaintiff -- that at least some hearing prior to the termination of O.A.S. was constitutionally compelled -- has now been conceded by defendants. The State of California, subsequent to Judge Zirpoli's order of December 20, has adopted new regulations which do provide for what plaintiff terms an "informal conference" with the recipient (whose aid the county is about to terminate) and the county agency which is about to make the determination that the recipient is no longer eligible for aid.[1]

1/ Reg. 44-325.43 (effective April 1, 1968), as set forth in CALIFORNIA STATE DEPARTMENT OF SOCIAL WELFARE MANUAL, provides as follows:

44-325.43 Notification . . .

The recipient, the parent or other person responsible for the child in AFDC, shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient. The county shall give such notice as it has reason to believe will be effective including, if necessary, a home call by appropriate personnel. Form AECD 239, Notice of Action, or a substitute form, may be used for this purpose. Every notification shall include:

.431 A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant.

.437 Assurance that prompt investigation is being made; that the withheld warrant will be

Therefore, the only issue remaining before this court is that raised by the class action which contends that the newly adopted regulations are constitutionally inadequate to afford due process at the pre-termination conference. The class contends that the regulations are insufficient in five respects: (1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an "impartial" referee; (2) the three day notice requirement is too short; (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence present at the conference; (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required.

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delivered as soon as there is eligibility to receive it; and that the evidence or other information which brought about the withholding action will be freely discussed with the recipient, parent, or other person, if he so desires (see Section .434 below).

.433 A statement of whether, if aid is withheld, the recipient will or will not continue to be certified for medical assistance during the month aid is withheld.

.434 A statement that the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated in order to enable the recipient, parent, or other person:

(a) To learn the nature and extent of the information on which the withholding notice is given
including, but not limited to that

The constitutionality of the "informal conference" must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff seeks.[2] At present such "fair hearing" is required to be given within 45 days[3] and a decision rendered within the next 75 days.[4] As of July 1, 1968, the hearing and decision will be required to be made within 60 days.[5]

The court finds that the present California regulations (see note 1) do comport with the due process clause of the fourteenth amendment to the United States Constitution. The State of California having given Mae Wheeler, the named plaintiff, a fair hearing in which she has been found eligible for O.A.S., and having adopted regulations which assure all within the class due process before termination,

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described in the notification pursuant to Section .431 above;

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

2/ CAL. WELF. & INST. CODE § § 10950-10965.

3/ CAL. WELF. & INST. CODE § 10952.

4/ CAL. WELF. & INST. CODE § 10958.

5/ HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 6200(j), as set forth in Handbook Transmittal No. 140 (attached to Defendants' Trial Brief as Exh. B), provides as follows:

6200. Requirements for State Plans

. . .

(j) Prompt, definitive, and final administrative action will be taken within 60 days from the date of the request for a fair hearing. The claimant will be notified of the decision, in writing, in the name of the State agency and, to the extent it is available to him, of his right to judicial review.

the purpose of this action has been achieved and this proceeding may, with propriety, now be dismissed.

It is SO ORDERED.

Dated: April 17, 1968

O. D. HAMLIN
United States Circuit Judge

ALBERT C. WOLLENBERG
United States District Judge

ALFONSO J. ZIRPOLI
United States District Judge

Motion to Intervene and for Leave to Intervene as Plaintiffs

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 394

68 Civ. 864

JOHN KELLY, *et al.*,

Plaintiffs,

RUBY SHEAFE, *et al.*,

Plaintiffs,

and

TERESA NEGRON, *et al.*,

Intervenor-Plaintiffs,

vs.

GEORGE K. WYMAN, *et al.*,

Defendants.

Intervenor-plaintiffs move to intervene or for leave to intervene, as plaintiffs in this action, in order to assert the claims set forth in the proposed complaint hereto.

1. They are members of the class whom plaintiffs Kelly, et al., and Sheafe, et al., purport to represent;

2. Their rights will be affected by any decision in this case; and

3. There are common questions of law and fact, and the facts in their cases exemplify certain issues which may not be fully demonstrated in the fact patterns now before the court, to wit:

a) Plaintiff-intervenor Negron and Gomez is not now receiving aid, was terminated without any notice whatever and has not been afforded any prior review after the effective date of the New York City review procedure.

b) Plaintiff-intervenors Fuller, and Coldburn, Sidor, Velez, and Pavey are not now receiving aid, were terminated months ago without any prior hearing or review, are still enmeshed in so-called fair hearing proceedings because of delay due solely to the City and State and have therefore suffered even further because of inadequacies in the hearing procedure subsequent to termination of assistance;

c) Plaintiff-intervenors Mulei and Fuentes were denied a fair hearing determination prior to termination by defendant Wyman even though such a procedure was approved by defendant Goldberg's employees and a lengthy fair hearing was had; and

d) Plaintiff-intervenor Rodriguez is not now receiving aid, was terminated without any prior notice or review, and will not be granted any prior review since the alleged basis for termination of aid is "whereabouts unknown."

e) Plaintiff-intervenor Soto is not now receiving aid, was terminated pursuant to the new procedure under which he received a grossly deficient and inaccurate notice of the reason for proposed termination. The decision in his case was based entirely upon unidentified hearsay evidence.

f) Plaintiff-intevenor Holmes was terminated after she failed to respond within the unduly short period allowed.

Dated: New York, New York
June 17, 1968

LEE A. ALBERT
HENRY A. FREEDMAN
Attorneys for Plaintiff-Intervenors

To:

LOUIS J. LEFKOWITZ
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State of New York
80 Centre Street
New York, New York 10013

J. LEE RANKIN
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of New York
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New York, New York 10007

Attorneys for Defendants

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 1505, United States Courthouse, Foley Square, City of New York on the 26th day of June, 1968 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard.

LEE A. ALBERT
HENRY A. FREEDMAN
MARTIN GARBUS
Attorneys for Plaintiffs

Intervenors' Complaint for Declaratory Judgment and Injunctive Relief

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

I

This is an action for injunctive and declaratory relief authorized by Title U.S.C. 1983 to secure rights, privileges and immunities established by the Fourteenth Amendment to the Constitution of the United States and the Social Security Act, Title 42 U.S.C. 301 *et seq.*, and the regulations promulgated thereunder. Jurisdiction is conferred on this Court by Title 28 U.S.C. 1343(3) and (4) providing for original jurisdiction of this Court in suits authorized by Title 42 U.S.C. 1983; and jurisdiction is further conferred on this Court by 28 U.S.C. 2201 and 2202 relating to declaratory judgments.

II

This is a proper case for determination by a three-judge court pursuant to Title 28 U.S.C. 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing and implementing Sections 213(2), 214, 304, 325, 350(2) (b), and 353(2) of the New York Social Services Law, Sections 84.2-84.24 and 351.26 of Volume 18, official compilation of Code, Rules and Regulations of the State of New York (hereafter referred to as 18 N.Y.C.R.R.), and related statutes, rules and regulations, insofar as these statutes and regulations require termi-

nation or suspension of financial aid in the form of public assistance [Aid to Families with Dependent Children (AFDC), Aid to the Aged, Blind and Disabled (AABD) and Home Relief (HR)] prior to the granting of adequate notice and opportunity for a hearing which meets due process standards, and without the provision at any appropriate time of a hearing meeting due process standards, on the grounds of the invalidity of said statutes and regulations under the Constitution and laws of the United States.

III

This action seeks an injunction and declaratory judgment restraining the enforcement of, and declaring unconstitutional, the aforesaid state statutes and state-wide rules and regulations, on their face and as applied and interpreted by defendants, on the grounds that said statutes, rules and regulations, and actions taken pursuant thereto, deprive plaintiffs of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and, so far as the AFDC and AABD programs are concerned, deprive plaintiffs of the "fair hearing" guaranteed by the Social Security Act, in that said statutes, rules and regulations deny to plaintiffs an opportunity for a hearing which satisfies due process standards in connection with termination or suspension of financial aid under the public assistance program at any appropriate time.

IV

Intervenor-Plaintiffs are adult citizens of the United States and residents of the City and State of New York who received public assistance until aid was terminated without a hearing or who are threatened with termination of aid without a hearing meeting standards of due process.

V

Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other recipients of public assistance who are similarly situated. All public assistance recipients are similarly affected by the statutes, rules and regulations challenged herein in that all are by statute, rule and regulation made subject to termination of their aid without the benefit of notice and a hearing meeting standards of due process. The persons in the class are so numerous as to make joinder impractical; there are common questions of law and fact; plaintiffs' claims are typical of the claims of the class and the representative plaintiffs will fairly and adequately protect the interests of the class. The parties opposing the class have acted or refused to act on grounds generally applicable to the class.

VI

Defendant George K. Wyman is the Commissioner of the Department of Social Services of the State of New York and is charged with statewide administration of the public assistance program and with establishing regulations to carry out the statutory provisions of said program.

Defendant Jack F. Goldberg is Commissioner of the Department of Social Services of the City of New York and is responsible for administering the public assistance program in the City of New York.

Defendant members of the State Board of Social Welfare are responsible for the promulgation of rules governing the policies and conduct of the Department of Social Services or the State of New York.

VII

The aforesaid public assistance programs created by the New York Social Services law provide financial aid to

certain needy persons. Persons who meet the statutory criteria receive financial aid as a matter of statutory entitlement.

VIII

At all times relevant hereto the State of New York and defendants, in order to receive federal funds for the Aid to Families with Dependent Children and Aid to Aged, Blind, and Disabled programs, have been required by the Social Security Act, Title 42 U.S.C. Sec. 301 *et seq.*, to have formulated a "state plan" for said programs in conformity with the provisions of the Act and the United States Constitution. The Social Security Act, as interpreted by regulations of the United States Department of Health, Education and Welfare, requires that a "state plan" provide for granting an opportunity for a fair hearing before the state agency to any individual aggrieved by an action of a local Department of Social Services.

IX

1. Plaintiff Theresa Negron and her five children, Diana Negron, age 9, Nancy Negron, age 8; Marilyn Negron, age 7; Jose Angel Negron, age 5; and Edward Negron, age 2, reside at 1473 Hoe Avenue, Bronx and receive ADC assistance in the amount of $78 semi-monthly to supplement Mrs. Negron's wages of $36 semi-monthly as superintendent of her building.

2. Plaintiff has lived at her present address for at least five years.

3. Some time before May 1, 1968, Mrs. Negron advised her caseworker from the New York City Department of Social Services that she would visit a friend in Philadelphia for a week or two during May, but that she would be

back by May 15. She also secured the consent of the landlord for whom she worked. Mrs. Negron was out of town for a week and returned on or before May 15.

4. By letter dated April 24, 1968, Mrs. Negron was asked to come to an interview concerning attempts to locate her husband. Mrs. Negron failed to keep this appointment.

5. On Saturday, June 1, Mrs. Negron did not receive her regular semi-monthly recurring public assistance grant. She assumed aid had been terminated because of her failure to attend the appointment.

6. On June 3 and June 4 she tried to telephone her caseworker and left messages for him to return the calls. The worker has not yet contacted Mrs. Negron.

7. Some time after June 1 she received another letter asking her to speak with the Department on June 6 concerning her husband.

8. Mrs. Negron attended her June 6 appointment and asked whether her original failure to keep the appointment resulted in termination of aid. The interviewer, Mrs. Jefferson, said that failure to keep the appointment was not the ground for termination. Mrs. Jefferson telephoned Mrs. Negron's caseworker and reported to Mrs. Negron that the worker believed that Mrs. Negron's husband was visiting her and was seen around school with the daughter, Diana. In response to Mrs. Jefferson's question, Mrs. Negron stated that this was not true.

9. On June 10, 1968, Mrs. Negron visited the United Welfare League at 929 Columbus Avenue. Miss Marian

Davidson, an employee of that organization, telephoned an employee of the City Department, as set forth in her affidavit annexed hereto as Exhibit A. He advised her that the reason for termination was that Mr. Negron was living in the household, although the official reason for the termination for the record was that the client was in Philadelphia. He also told her that no written notification of termination was sent.

10. A fair hearing has been requested. Mrs. Negron and her children continue to suffer severe and irrevocable injury due to the continued refusal of aid.

X

1. Plaintiff Cynthia Fuller and her husband Mack, residing at 2508 Clarendon Road, Brooklyn, were recipients of Aid to Dependent Children on behalf of themselves and the youngest six of their nine children until January 1, 1968.

2. By notice dated December 11, 1967, Mrs. Fuller's semi-monthly public assistance grant of $205 was reduced to $44 on the ground that rent could no longer be paid by the Department until its legal department had clarified facts about the ownership of the house in which the Fuller family resided. Mrs. Fuller requested a fair hearing to review the reduction by letter dated December 18, 1967.

3. Assistance was fully suspended by notice dated December 26, 1967, for a number of reasons set forth in the Notice of Suspension attached hereto as Exhibit B. By letter of December 28, 1967, plaintiff requested that the fair hearing include the issue of the suspension, and that aid be continued pending the hearing.

Intervenors' Complaint

4. Assistance was terminated by notice of December 28, 1967, effective January 1, 1968 attached hereto as Exhibit C. The ground for termination was refusal to accept employment. No opportunity for a hearing was afforded prior to termination of aid.

5. A hearing was scheduled on January 23, 1968 at 11 a.m., but because it is the custom and practice of the New York State Department of Social Services to adjourn all hearings commenced in the morning at 12:00 o'clock, noon, to some future unspecified date, the hearing was adjourned.

6. The hearing was not rescheduled until February 13th, 1968, notwithstanding the request in the letter of December 28, 1967 for emergency relief. On February 13, 1968, the hearing was adjourned without date at 5 p.m. At that time the City stated it would need time to prepare to cross-examine Mrs. Fuller's witness, Mr. John L. Butler, who had completed his direct testimony.

7. On February 14, 1968 an additional letter was sent requesting that the hearing * * * "be scheduled as quickly as possible."

8. The hearing was rescheduled on March 15, 1968 at 9:30 a.m., at which time the New York City Department of Social Services requested an adjournment. Said adjournment was granted despite objection by Mrs. Fuller and her attorney, and no future date was set for the hearing. The adjournment was requested by the City in part because it had not been furnished a transcript of the prior proceedings although over a month had passed. Mrs. Fuller's attorney had not received a copy of the transcript either. The City also requested an adjournment because a witness

was not present, but at that point that witness was not scheduled to testify and Mrs. Fuller's witness, Mr. Butler, was present for cross-examination. When the hearing finally resumed, as set forth below, the City cross-examined Mr. Butler for three hours. The City witness has not yet testified although two months have passed.

9. The hearing was subsequently rescheduled for April 9, 1968. Due to the funeral of the Rev. Martin Luther King and the closing of all state offices on that date, the matter was adjourned without notice.

10. Contrary to the custom and practice of the New York State Department of Social Services, the hearing was rescheduled on April 15, 1968 without notice to the recipient's counsel. At that time, the City again requested an adjournment for the reason that the minutes of the parts of the hearing previously held in February had not yet been reproduced. The adjournment was denied.

11. The referee proceeded to take further testimony, all in the form of cross-examination by the City of Mr. Butler, a witness for Mrs. Fuller, until 5:00 p.m. At that time the City renewed its request for an adjournment and the Referee announced over strenuous objections by Mrs. Fuller's counsel that the hearing would be adjourned without date.

12. The hearing was rescheduled on May 2. The cross-examination of Mr. Butler by the local agency continued for an additional one and one-half hours notwithstanding repeated objections to harassment of the witness and redundancy. After five minutes of redirect examination the Referee announced at 11:45 a.m. over objection that the hearing would then be adjourned to be rescheduled on some future unascertained date.

13. The hearing was rescheduled and completed on May 28. No decision has yet been rendered.

14. Aid was applied for anew by Mrs. Fuller in February, 1968. By notice dated February 23, 1968, Mrs. Fuller was denied aid on a different ground, that of inability to ascertain family income.

15. Mrs. Fuller and her family continue to suffer hardship and incur debts as the result of defendent Goldberg's refusal to continue aid until a hearing decision has been reached and defendant Wyman's failure to complete the hearing.

XI

1. Plaintiff Alma Coldburn, 521 Thatford Road, Brooklyn, New York, was a recipient of Aid to Dependent Children in the amount of $117.45 on behalf of herself and her son, Frederick until March 1, 1968.

2. Mrs. Coldburn's aid was suspended pursuant to notice dated February 20, 1968 for the stated reasons that she owned a car, that she was living with a man, and that she had a bank account which she had failed to report.

3. In fact, Mrs. Coldburn needs the car to go to and from her doctors and to her job. She visits various doctors at least once every week and several times a month must go to the hospital for emergency treatment, often late at night. The man to whom the Department referred did not live in the house and was not supporting Mrs. Coldburn, but had rendered assistance when Mrs. Coldburn was ill. The unreported bank account contained less than five dollars.

4. No opportunity for a hearing was afforded prior to termination of aid.

5. The fair hearing, scheduled on March 28, 1968, commenced on that date and was adjourned without date at the end of the day.

6. Counsel requested that the hearing be rescheduled on an emergency basis in a letter of April 15, 1968.

7. The hearing resumed an hour after the scheduled time on April 30 and was adjourned without date at 5 p.m. over the objection of counsel. The hearing resumed on May 27 and was completed. No decision has yet been rendered.

8. Mrs. Coldburn has frequently reapplied for aid and has been advised that her case had only been suspended and that there was no need to reapply.

9. Mrs. Coldburn has been recuperating from a major operation in the Fall of 1967, and has suffered further illnesses. She continues to be harmed as the result of defendants' refusal to grant aid, conclude the hearing promptly, and render a decision.

XII

1. Plaintiff Magdalena Leon Mulei, 144 West 119 Street, New York, is currently a recipient of Aid to Dependent Children in the amount of $86.10 semi-monthly on behalf of herself and her two children.

2. Mrs. Mulei's aid was suspended effective March 16, 1968 on the ground that her new husband was able to provide for her illegitimate children.

3. In order that the family would not be subjected to irrevocable injury due to the cessation of assistance, the

New York City Department of Social Services reinstated assistance to the family pending a decision after a fair hearing before the State on the issue of Mr. Mulei's liability to support the children.

4. A fair hearing was held March 21, 1968 at which time extensive testimony was taken concerning a central factual issue, Mr. Mulei's refusal to provide any aid whatever to the children.

5. Defendant Wyman refused to reach a decision on the merits for, as stated in his decision of April 18, 1968, attached as Exhibit D hereto, "a Fair Hearing prior to discontinuance" is neither authorized nor provided for by the relevant statutes and regulations.

6. The City thereafter continued aid to the family, and in compliance with the new termination procedures notified the Plaintiff on or about June 1, 1968 of their intention to discontinue assistance, attached as Exhibit E hereto.

7. Plaintiff is therefore directly threatened with loss of her aid without a due process hearing even though she has been through a hearing on the merits. Denial of aid will cause further irrevocable injury to Mrs. Mulei and her children.

XIII

1. Plaintiff Maria Fuentes resides at 911 F.D.R. Drive, New York, New York and is a recipient of Aid to Dependent Children for herself, three of her children and a retarded "godchild" whom she plans to adopt. Until March 5, 1968, Mrs. Fuentes regularly received a semi-monthly grant of $165.20 for herself and the children.

2. On March 5, 1968, Mrs. Fuentes received a Notice of Discontinuance of Public Assistance from the City De-

partment of Social Services. That notice, annexed hereto as Exhibit F, states that aid was terminated because: "You have a large sum of money in the bank for which you were unable to give a satisfactory explanation."

3. That notice of termination failed to give Mrs. Fuentes the written notice of the Department's intention to terminate her case at least seven days prior to the proposed effective date of termination and an opportunity to present evidence to a social services official prior to termination of assistance, as required by the then current 18 N.Y.C.R.R. §351.26.

4. The money in that bank account belonged not to Mrs. Fuentes but to her daughter, Mrs. Constance Samuelsohn and to her son, Mr. Felix Toledo.

5. On information and belief, an attorney from Mobilization for Youth, Inc. called Mrs. Minerva Critchlow, the Administrator of the Yorkville Welfare Center where Mrs. Fuentes' case is assigned on behalf of Mrs. Fuentes to ask that the Department comply with the prior hearing regulations. Mrs. Critchlow replied that she was "aware" of the relevant regulations, that they were "not being implemented here yet," and that she "refuse[d] to apply it to the cases" at her Center.

6. The attorney then called Mr. Samuel Felder, Counsel to the New York City Department of Social Services, who stated that the City Department was then unable to implement the State prior hearing regulation. Mr. Felder then created an *ad hoc* procedure for this problem, whereby Mrs. Fuentes would request the ordinary, subsequent "Fair Hearing" and, pending the decision from that hearing, her grant would be continued on an emergency basis.

7. Despite the agreements between Mr. Felder of the Department's Legal Office, Mr. John Whalen of the Bureau of Public Assistance, and Mrs. Fuentes' attorney; despite the presentation of a letter outlining that agreement to Mrs. Fuentes' caseworker and supervisor; and despite numerous telephone conversations between Mrs. Fuentes' attorney and various employees of the City Department, it was almost a week before Mrs. Fuentes received more than an emergency food grant of $1 per day per person, and she has never received the full amount to which she was entitled.

8. Mrs. Fuentes, through her attorney, requested a Fair Hearing on March 15, 1968, to contest her illegal termination from public assistance.

9. The Fair Hearing was scheduled for and held on March 29, 1968. At that Fair Hearing, Mrs. Fuentes and the representatives of the City agreed that the City had failed to comply with the prior hearing regulations in the Fuentes case. The City Department admitted that as of the date of the hearing, it had not yet implemented the prior hearing regulation on any case. The Referee expressed concern that almost a month after the effective date of the State regulations, the City was still failing to abide by the regulation.

10. Mrs. Fuentes, Mrs. Samuelsohn and Mr. Toledo offered at the hearing extensive evidence that the money in the bank account belonged to Mrs. Samuelsohn and Mr. Toledo, rather than to Mrs. Fuentes.

11. On April 30, 1968, Commissioner Wyman handed down a decision on the Fuentes case. Commissioner Wyman in his decision characterized the procedure which the

City had set up as a Fair Hearing prior to discontinuance. He held that there "is nothing in the Social Services Law, Rules of the State Board of Social Welfare, or the Regulations of the State Department of Social Services that authorizes, or makes provisions for, a prior Fair Hearing." He held that since Mrs. Fuentes had continued to receive her public assistance grant, there was no actual discontinuance and no issue to be reviewed at a Fair Hearing. That decision is attached hereto as Exhibit G.

12. Mrs. Fuentes is therefore currently threatened with termination of her public assistance aid without an opportunity for a hearing at an appropriate time.

XIV

1. Plaintiff Minerva Rodriguez, and her three children, Alberta, age 4 years; Ismal, age 2 years; and Victor, age 7 months, reside at 586 Prospect Avenue, Bronx, New York and until June 1, 1968 received Aid to Dependent Children in the amount of $73.85 semi-monthly.

2. Mrs. Rodriguez was receiving less than a full welfare budget because the Department deducted anticipated payments of twenty dollars per week from Mr. Rodriguez for the support of the children, although in fact such payments were not being made.

3. Mrs. Rodriguez did not receive her regular semi-monthly check from the Department of Social Services in the mail on Saturday, June 1, when it should have arrived. She had received no notice that aid was terminated. On Monday, June 3, she telephoned her caseworker, a Mr. Smith, at the Melrose Welfare Center, and was advised that her case had been closed and that she would have to reapply to receive further aid.

4. Upon information and belief, Mr. Smith had visited Mrs. Rodriguez's apartment early in May 1968 and again on or about May 21 or May 22. No appointment had been made for either of those times. Mrs. Rodriguez was not home for the first unannounced visit. Mrs. Rodriguez's children were at home with a baby sitter at the time of the second unannounced visit. The baby sitter spoke English very poorly and could not adequately respond to the case-worker's questions. (See affidavit of Mrs. Minnie Porter attached hereto as Exhibit H.)

5. On information and belief, assistance to Mrs. Rodriguez was terminated on the ground that her whereabouts were unknown.

6. Mrs. Rodriguez continues to live at the same address where she has always received her public assistance check.

7. Mrs. Rodriguez has applied for emergency aid. To date such aid has been denied and Mrs. Rodriguez and her children continue to suffer irrevocable injury because of this wrongful refusal to continue assistance.

XV

1. Ina Sidor is a 31 year old recipient in the AFDC category on behalf of herself and one child who has been medically determined to be "profoundly deaf." She and the child reside at 32 Bassett Avenue, Brooklyn, New York. For some time prior to February 1968, she regularly received $95.95 semi-monthly from the New York City Department of Social Services.

2. Mrs. Sidor is married but has been legally separated from her husband since May 23, 1966, when she and her

husband entered into a written separation agreement. By the terms of the agreement, Mr. Sidor was required to pay one half of his take home pay to Mrs. Sidor for her support and that of her child. Mr. Sidor did not make the required support payments and by May 4, 1967, when Mrs. Sidor was first accepted for public assistance, he was approximately $2000 in arrears.

3. At the time she was accepted for public assistance, Mrs. Sidor owned an automobile. The Department of Social Services did not require that the automobile be disposed of or that the agency be given a lien thereon. The automobile had been purchased in 1965 by Mrs. Sidor's mother, who also paid all operating expenses of the car. Mrs. Sidor used the car to transport her child to a special school for deaf children and to a hospital clinic for treatment.

4. Assistance to Mrs. Sidor was suspended for the first time on August 16, 1967, because of "failure to comply with Department resource policy." The suspension occurred after Mrs. Sidor's case was transferred from the Borough Hall to the Linden Welfare Center. The Department objected to Mrs. Sidor's ownership of the car, claimed that her mother should be paying for items of general need rather than for the upkeep of the automobile, and further claimed that Mrs. Sidor owned stock in an insurance company. Mrs. Sidor requested a Fair Hearing.

5. On October 16, 1967, before the Fair Hearing was scheduled, public assistance to Mrs. Sidor was restored. This was after the automobile had been re-registered in the name of Mrs. Sidor's mother.

6. Mrs. Sidor's first Fair Hearing was held on December 4, 1967. No transcript of the minutes of the Fair

Hearing held on December 4, 1967, was received by Mrs. Sidor or the Legal Aid Society, although such was requested by the Legal Aid Society in writing on December 14, 1967.

7. The Decision After Fair Hearing was rendered on March 7, 1968. In the Decision, the Commissioner of the New York State Department of Social Services found that "4 (1) The appellant owned no stock and was willing to authorize the agency to contact the attorney who represented her in a matrimonial action to obtain any information the agency wanted, and the appellant fully cooperated in the agency's financial investigation," that "The agency did not contend that the appellant's equity in the automobile exceeded the amount established by it as a burial reserve, and therefore ownership of the automobile did not make the appellant ineligible for assistance"; and that "The appellant's mother is a non-legally responsible relative and the agency was required to abide by her imposed restriction of money, i.e., payment for automobile expense." The Commissioner held that the suspension of Mrs. Sidor's grant of public assistance on August 16, 1967, was without basis and in error; he ordered the Department of Social Services to issue a grant for the verified debts incurred by appellant for items of need during the period of suspension and in fact Mrs. Sidor was granted $375 to pay those debts. (Decision attached hereto as Exhibit I.)

8. In the meantime, on February 16, 1968, while a Decision After the Fair Hearing of December 4, 1967, was still pending, assistance to Mrs. Sidor was suspended again. The reason given for the suspension was "failure to comply with resource policy." The Department of Social Services claimed that Mrs. Sidor owned stock in an insurance company and an automobile. This was the same

stock and the same automobile which had been the subject of the Fair Hearing held on December 4, 1967. The Department also claimed that Mrs. Sidor owned shares of the Dreyfus Fund. Again Mrs. Sidor requested a Fair Hearing.

9. Mrs. Sidor's second Fair Hearing was held on March 28, 1968. No decision has been rendered to date. At the hearing she submitted evidence contradicting each of the Department's claims. Some time in April, 1968, Mrs. Sidor received an undated Notice of Termination from the Department of Social Services. She has received no public assistance since February 11, 1968.

10. Since February 11, 1968, Mrs. Sidor has had to borrow approximately $900 in order to maintain herself and her child. From February 11, 1968, to April 18, 1968, Mrs. Sidor did not receive any income from any source. On April 18, 1968 Mrs. Sidor began to receive support payments from Mr. Sidor at the rate of $30 a week. These payments were ordered, on Mrs. Sidor's application, by the Family Court of the City of New York on February 14, 1968. Earlier support payments by Mr. Sidor to the Department of Social Services through the Family Court, made after Mrs. Sidor had been suspended, have not been paid over to Mrs. Sidor by the Department.

11. On May 21, 1968, Mrs. Sidor again applied to the Family Court and Mrs. Sidor was ordered to pay $50 a week for the support of Mrs. Sidor and her child. Mrs. Sidor received a check for $50 on May 27, 1968, pursuant to that order, but has received no support payments from Mr. Sidor since that time.

12. During the time Mrs. Sidor was on public assistance, she repeatedly asked the Department of Social Ser-

vices to institute a proceeding against her husband for the past support payments due her but the Department failed to take any such action.

13. Mrs. Sidor and her child continue to suffer irrevocable injury as the result of the defendants' refusal to grant aid or render a decision after hearing.

XVI

1. Angela Velez is a 26 year old recipient of public assistance in the AFDC category on behalf of herself and four children. She has no permanent residence at this time, having been evicted from her apartment at 351 Broadway, Brooklyn, New York. Until March 11, 1968, when assistance to her was suspended, Mrs. Velez regularly received $80.65 semi-monthly.

2. Mrs. Velez is married but has been separated from her husband since December 1963. She applied for public assistance in February 1964. Her husband has regularly contributed $20 a week to the family's support; on April 5, 1968 in the Family Court of the City of New York, Mr. Velez agreed to increase his contribution to $30 a week.

3. Some time early in March 1968, Mrs. Velez's then case worker came to her home. During the visit Mrs. Velez requested special grants for items of furniture which she needed and for coats for the children. The case worker told Mrs. Velez that she could not get the requested items, saying: "You people think welfare has got to give you for everything." At this Mrs. Velez lost her temper and told the case worker, "You come here to see my needs and you are not doing it. If you are not here to see my needs, what are you doing here? Get out." The case worker's reply was: "You cannot talk to me that way. I can close

your case." The argument continued until the case worker left.

4. Mrs. Velez received a notice of suspension of assistance dated March 11, 1968, a few days thereafter. The reason for the suspension given in the notice was that Mrs. Velez was living with her husband. She was provided no opportunity for review prior to termination as was required by 18 N.Y.C.R.R. §351.26, then in full force and effect. Mrs. Velez requested a fair hearing.

5. On April 18, 1968 Mrs. Velez, accompanied by Howard Ginsburg and two witnesses, appeared at the fair hearing section at 117 Liberty Street, New York, New York at the time scheduled for Mrs. Velez's hearing. The representatives of the New York City Department of Social Services did not appear for the hearing. The hearing was adjourned without a date; it was eventually rescheduled for June 6, 1968, a full seven weeks after the hearing at which the City failed to appear.

6. On June 6, 1968 Mrs. Velez's fair hearing was opened but could not be completed that day and another adjournment was required. The hearing was rescheduled for June 17, 1968.

7. At the hearing on June 6, the case worker testified that Mrs. Velez's grant of public assistance was suspended on the basis of one conversation between her and Mrs. Velez's landlady; at the time the case was closed on March 20, the only additional evidence in the possession of the Department of Social Services was a post office clearance concerning Mr. Velez's address. All other evidence introduced by the Department had been obtained by them after Mrs. Velez's case was closed.

8. Since her case was closed Mrs. Velez and her four children have been struggling to manage with the $20 or $30 a week which Mr. Velez has been giving them. She was unable to pay her rent of $75 for April and her landlady commenced an eviction proceeding against her. After her fair hearing was adjourned on April 18, 1968, Mr. Howard Ginsburg of the Legal Aid Society made efforts to obtain emergency assistance from the Department to pay for Mrs. Velez's rent; a grant of $75 was finally issued by the Department after extended high-level negotiations. In May Mrs. Velez was again unable to pay her rent and an eviction proceeding was brought against her by her landlady. A final order was entered against her and she was served with a 72-hour notice of eviction on May 21, 1968. The Department of Social Services refused to issue another emergency grant for the rent despite repeated efforts by members of the staff of the Legal Aid Society. On May 28, 1968 Mrs. Velez and her children vacated their department at 351 Broadway, Brooklyn, New York. They are now residing with Mrs. Velez's sister, Eva Ruiz, at 111—57th Street, Brooklyn, who has nine children of her own and is also a recipient of public assistance.

9. Mrs. Velez and her children continue to suffer irreparable injury as the result of the failure of the State to complete the fair hearing.

XVII

1. Plaintiff Felix Gomez was a recipient of a public assistance grant for Aid to Dependent Children for himself, his wife, and his four children and resides at 606 East 13 Street, New York, New York.

2. Mr. Gomez's wife, who is also known as Mrs. Confesora Oyola, received a notice of change in grant from

the New York City Department of Social Services, dated April 1, 1968, and annexed hereto as Exhibit J, which states that the family's grant is being changed because Mr. Gomez is employed.

3. On April 12, 1968, Mrs. Gomez received from the City Department a Notice of Discontinuance of public assistance annexed hereto as Exhibit K, which states effective immediately the family is no longer eligible since Mr. Gomez has returned to the home and is employed. No opportunity for a prior review was provided. On information and belief, Mr. Gomez's attorney was advised by Mr. Lane of the City Department's Office of Counsel that the relevant State regulation was a directive without the force of law and enforcement of it was a discretionary matter.

4. Mr. Gomez, through an attorney, requested a fair hearing on April 17, 1968.

5. On numerous occasions subsequent to the request for a fair hearing, Mr. Gomez's attorneys spoke with his case worker and supervisor concerning Mr. Gomez's case. Over the course of one month, the Department produced a variety of unrelated reasons for the termination. Some reasons were propounded by the Department and ignored by them in subsequent discussions. Some were propounded and then refuted by plaintiff's attorneys and then new reasons were propounded. The reasons given for the termination were: Mr. Gomez's debt of $600.00 to his case worker; Mr. Gomez's concealment of his presence in the country and of his employment with the same company for 10 years; Mr. Gomez's request that his case be closed; Mr. Gomez's salary of $66.00 and contributions from Mr. Gomez's sister. Had he been granted his right to a prior hearing Mr. Gomez would have been able to prove all of these "reasons" were false. Ultimately the City declined to rely upon any of these reasons.

6. Mr. Gomez's fair hearing was scheduled on May 1, 1968. It was adjourned at the request of his attorney because the Department had failed to provide either Mr. Gomez or his attorney the fair hearing summary report required two days in advance by regulation 18 N.Y.C.R.R. §358.5(g), without which it was impossible to understand the basis for termination. The hearing was rescheduled for and held on May 23, 1968.

7. For a period of one and one half hours immediately prior to the fair hearing, plaintiff's attorney negotiated with representatives of the City. The same variety of reasons were again advanced for the termination and the Department insisted on the necessity for termination.

8. Once the hearing began, however, the Department immediately changed its story and "withdrew" the termination of Mr. Gomez's case. The City agreed that Mr. Gomez should receive public assistance grants, as long as he remained otherwise eligible.

9. Mr. Gomez received neither his regular June 1st semi-monthly grant nor an emergency food grant for June other than $18.

10. On June 10, 1968, his attorney called both the case worker and the supervisor to find out why the regular grant had not been issued. She was told that Mrs. Gomez, with whom Mr. Gomez has been having serious marital difficulties, had presented the case worker with a receipt for a $200 gold watch which she alleged Mr. Gomez bought for his girlfriend. The attorney explained the bad feeling caused by the marital difficulties, asked what the receipt said, and was told it stated merely a figure of $250.00, with neither signature, nor name. Finally the supervisor agreed with the attorney that the purchase was most unlikely in

view of the fact that Mr. Gomez received only $51.00 from mid-April until June. It was agreed that Mr. Gomez should pick up the June grant for himself and his four children on June 12, 1968.

11. Plaintiff did not make the purchase alleged by his case worker nor was he given any opportunity to meet this allegation in any way which the Department would deem satisfactory; even if such purchase had been made, however, termination based solely on the fact of purchase without more, would not constitute, under the statutes and regulations under which the Department operates, grounds for lawful termination.

12. On June 12, when Mr. Gomez went to the Yorkville Welfare Center, the case worker refused to give him any money.

13. Since May 8, when his wife left, Mr. Gomez has been responsible for caring for his four children and has been unable to work. He and the children are suffering irrevocable injury as the result of the City's repeated wrongful terminations of aid without any opportunity for timely review.

XVIII

1. Plaintiff Leroy Pavey is 63 years old and was a recipient of Home Relief in the amount of $86 semi-monthly until January 15, 1968. Part of his left leg has been amputated. He is presently recovering from another serious operation at Columbus Hospital, 227 East 19 Street, Manhattan.

2. Some time before January 15 Mr. Pavey took up temporary residence in the Bowery Mission, 227 Bowery, New York, New York. His quarters there were far more

satisfactory than other housing in the area which he could afford.

3. Mr. Pavey received no official notice of suspension or reason for suspension. He assumed the reason was for moving to the Bowery Mission. The Mission has supplied him with minimum necessities.

4. After obtaining legal assistance through Mobilization For Youth Legal Services Unit, he requested a hearing on suspension of his assistance. The hearing was conducted and concluded on March 25, 1968.

5. During the hearing Plaintiff's counsel objected strenuously to the fact that plaintiff had received no notice of termination at all. Several days later, plaintiff received a Notice of Discontinuance of Grant dated February 7, 1968. The reason given for discontinuance was receipt of other public aid.

6. No hearing decision has yet been rendered, despite telephone calls to Albany by his attorney.

7. Plaintiff applied for Aid to the Disabled after he no longer received his former assistance. He subsequently received a Notice of Non-acceptance, the stated reason being that he was not properly domiciled, in that the Bowery Mission is classified as a temporary shelter and categorical assistance is not permitted in such a shelter.

8. Upon his release from the hospital, expected shortly, Mr. Pavey wishes to obtain his own living quarters, but will be unable to do so without public assistance. He now has no money for incidental living expenses. Mr. Pavey is threatened with irreparable injury as the result of defendant Wyman's failure to render a decision for the past three months.

XIX

1. Plaintiff Antonio Soto is a 40 year old recipient of Home Relief who lives at 2688 Broadway, New York, New York.

2. On June 1, 1968, Mr. Soto received a notice of intent to discontinue his public assistance grant on June 4, 1968, attached hereto as Exhibit L. The only reason given on the notice was "failure to attend rehabilitation C.O.C."

3. Mr. Soto consulted Richard Greenberg of the United Welfare League, 927 Columbus Avenue, New York, New York. On information and belief, after a number of telephone calls to the local welfare center, Mr. Greenberg was able to establish that termination was based upon New York Social Services Law §131(2). Mr. Greenberg attempted to respond to the factual claims made over the telephone in his letter on June 5, 1968, attached hereto as Exhibit M.

4. Mr. Soto was notified by letter dated June 11, 1968 and attached hereto as Exhibit N, that his public assistance was to be discontinued after review for the following stated reasons: "Failure to keep appointments at rehabilitation clinic, Clinton C.O.C. appointment of 5/23/68 was kept but since that date no regular attendance."

5. The decision by the review officer, the case supervisor in Mr. Soto's case, was made available to him although this is not the usual procedure. A copy is attached hereto as Exhibit O. The decision relied entirely upon hearsay statements from various unidentified workers to the effect that Mr. Soto was a "parasite" and that he was "playing a game." The information set forth in Mr. Greenberg's letter was rejected. The decision was also

based upon a number of irrelevant regulations, and not upon that section of the statute to which Mr. Greenberg had been referred.

6. A fair hearing has been requested.

7. Mr. Soto is suffering irreparable injury as the result of the wrongful termination of his aid following a review procedure which did not meet the standards of due process of law.

XX

1. Plaintiff Mary Holmes is 24 years old and resides at 11½ West 102 Street, New York, New York, with her two children, Robin, age 4, and Angelia, age 1. She was a recipient of public assistance for herself and her two children in the amount of $113.90 semi-monthly until June 3, 1968, when her assistance was terminated. She has no income and no economic resources other than her public assistance grant.

2. Since December 1967 plaintiff Holmes has been looking for a more satisfactory apartment. She discussed this idea with her various case investigators who supported this idea. In April 1968 plaintiff Holmes located a more desirable apartment and so informed her case worker at that time.

3. On information and belief, the City Department initially refused to approve the building or to pay the agent's fee. However, the City Department did ultimately approve both this apartment and the agent's fee after speaking several times with Mrs. Holmes' representative from the United Welfare League.

4. On information and belief, the case worker told Mrs. Holmes' representative that the money for the apartment

would be forthcoming on May 15, 1968, and that the agent had agreed to keep the apartment available until that time. However, when Mrs. Holmes spoke with the agent on May 15, 1968, he informed her that he had not agreed to hold the apartment past May 13, 1968, and that the apartment was no longer available. He agreed to look for other apartments for her.

5. Mrs. Holmes informed her case worker of the loss of the apartment around May 16, 1968. Around May 21, 1968, the case worker demanded the return of the money sent for the apartment. Mrs. Holmes told the case worker that she was presently looking at other apartments and would use the deposit money for an apartment if a suitable one appeared. If none of the ones she was looking at was suitable she would return the money to the Department.

6. Mrs. Holmes' Case Supervisor, Mr. Blackwell, then spoke with Mrs. Holmes and asked her about the whereabouts of the money. Mrs. Holmes informed Mr. Blackwell that she had spent some of the money on a bed for her four year old child who had previously slept with Mrs. Holmes and who constantly wet the bed, but that she did not have a receipt for the purchase. She told him she was holding the remainder of the money for use as a deposit on a new apartment. Mr. Blackwell ordered her to bring the money to the welfare center immediately.

7. Mr. Blackwell sent a registered letter dated May 22, 1968, and annexed hereto as Exhibit P, to Mrs. Holmes. Due to incorrect addressing by the Department this letter was not received by Mrs. Holmes until May 25, 1968. In his letter Mr. Blackwell characterized Mrs. Holmes' behavior as a "misuse of funds"; informed her that she had

been rude to him and told her that her June 1, 1968, semi-monthly grant would not be forwarded to her and that her case might be suspended unless she immediately produced receipt for expenditures and returned the remaining money.

8. On May 29, 1968, Mrs. Holmes received a Form 3C notice of intention to suspend her grant, annexed hereto as Exhibit Q, for "failure to explain management [of the funds in question] and to verify purchases made with these funds." The statement indicated that her grant would be "suspended effective June 1, 1968, unless she requested a "review" by June 3, 1968.

9. On or about June 6, 1968, Mrs. Holmes received a "Notice of Discontinuance" dated June 3, 1968, annexed hereto as Exhibit R, informing her of her ineligibility for public assistance for "failure to explain management * * * and failure to comply with policy in regard to explanation of management." No "policy" is set forth.

10. Mrs. Holmes had not previously requested a review in response to the Form 3C received May 29, 1968, two days prior to the proposed suspension date, because she did not understand the consequences of this form and the nature of the "review" offered. Upon receiving the "Notice of Discontinuance" she informed her representative from the United Welfare League, who then requested an opportunity to submit written documents for a review of Mrs. Holmes' termination. This request was denied even though the period provided by the Notice of Intention to Suspend was less than that required by State regulation.

11. Mrs. Holmes has requested a fair hearing which has not yet been scheduled. She and her children continue to suffer irreparable injury as the result of this wrongful termination of assistance.

XXI

Sections 213(2), 304, 325 and 353(2) of the New York Social Services Law, and 18 N.Y.C.R.R. Sections 82.2 through 82.23 and 356.4, prescribing the hearing procedure in the public assistance program, and Sections 214, 304(6), 325 and 350(2) (b) and 18 N.Y.C.R.R. 351.22 and 351.26 prescribing the manner of termination or suspension of aid in the public assistance program, on their face, and as interpreted and applied to plaintiffs and members of their class, deprive the plaintiffs of the due process of law guaranteed by the Fourteenth Amendment to the extent applicable, of the "Fair Hearing" guaranteed by the Social Security Act in that

1. Under the prior review procedure pursuant to 18 N.Y.C.R.R. §351.26:

a) The recipient is inadequately advised of the reason for termination.

b) The recipient is not advised of the regulations and rules relied on for termination.

c) The recipient is not advised of the evidence upon which the department is relying for its decision.

d) The recipient is afforded no opportunity to reply, in that New York allows seven calendar days from the date the proposed termination is mailed for receipt of the legal case, letter and all documents of the recipients.

e) The recipient is restricted to presentation of documentary evidence only, notwithstanding that many recipients and witnesses are illiterate.

f) The recipient is able neither to determine or confront the source of information used against him.

g) Even when the issue is one solely of credibility, no opportunity whatever for cross-examination is provided.

h) The review officer, who is a full time "case supervisor" in the Department hierarchy, has had substantial and continuing involvement with the recipient's case, has personally rendered many decisions in that recipient's case in the past, and may well have participated informally and formally, in the decision to terminate aid which he is asked to review.

i) Review officers have delegated their review functions, including the writing of the decision to the unit supervisor responsible for the decision to terminate aid then under review.

j) Review officers have received no training whatever in the manner in which to conduct review, and have had the review function added to their regular duties without any compensating reduction of duties.

k) Employees designated as review officers have objected to this function on the ground that they cannot be impartial.

l) Review can be avoided entirely by a "finding" that the recipient's whereabouts are unknown or that the recipient has left the state.

2. The subsequent "fair hearing" is not held at an appropriate time, since

a) The hearing is generally not commenced for at least several weeks after a request, despite the fact that no emergency aid is granted.

b) Hearings are adjourned without date at noon or 3 or 5 p.m., after an hour or so, or if the City is unprepared, regardless of hardship, and are rescheduled three to six weeks later.

c) Decisions are generally not rendered for several months after the hearing is closed, regardless of hardship.

d) Compliance with decisions favorable to recipients is tardy and grudging.

3. The "fair hearing" is procedurally deficient, since

a) Documents are submitted in advance to the referee and not made available to the recipient.

b) The City's entire case often depends upon excerpts from the case record which it selects. The record is not made available to recipients even if clearly favorable material is contained therein.

c) The City's entire case is often presented by persons with no personal knowledge of the facts to which they are testifying.

4. The systematic administrative practices utilized in New York review procedures are contrary to provisions of 42 U.S.C. §602(a)(4) and the purposes of the said Social Security Act.

XXII

Plaintiffs have no adequate remedy at law and defendants will continue to cause and threaten to cause irreparable injury to plaintiffs unless enjoined by this Court.

XXIII

Plaintiffs do not have adequate resources with which to support themselves and their families in the absence of their public assistance grants.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated, that this three-judge court:

1. Enter a preliminary injunction ordering the defendants to refrain from refusing to pay the named plaintiffs herein their regular public assistance grants unless and until defendant Wyman has determined after a fair hearing that suspension or termination was proper.

2. Enter a declaratory judgment pursuant to Title 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that Sections 213(2), 214, 304, 325, 350(2) (b) and 353(2) of the New York Social Service Law and related provisions, and the regulations and rules issued pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and the Social Security Act on their face and as applied, insofar as they authorize and require termination or suspension of public assistance prior to granting reasonable notice and opportunity for a hearing meeting due process standards.

3. Enter a permanent injunction restraining the defendants, their successors in office, agents and employees from terminating or suspending the aid of any public assistance recipient prior to the granting of reasonable and adequate notice and opportunity for a hearing which satisfies the standards of due process of law.

4. Allow plaintiffs their costs herein, grant them and all others similarly situated such additional or alternative relief including payment of all monies wrongfully withheld, as the Court may deem to be just and appropriate.

LEE A. ALBERT
HENRY A. FREEDMAN

MARTIN GARBUS

HAROLD ROTHWAX

DAVID A. DIAMOND
MARIANNE ROSENFIELD

ROBERT SUGARMAN

DAVID GILMAN

MARY B. TARCHER

LOUISE GRUNER GANS
CARL RACHLIN

STEVEN NAGLER

Attorneys for Plaintiffs

Exhibit A Annexed to Foregoing Complaint

Affidavit of Marian Davidson

(See Opposite ☞)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARIAN DAVIDSON being duly sworn deposes and says:

1. That I reside at 125 East 4th Street in the City and State of New York.

2. I am the Assistant Director of the United Welfare League located at 929 Columbus Avenue, New York City.

3. On June 10, 1968, Mrs. Negron, the intervenor, in the above-entitled action, sought our services in regard to the Welfare Department's termination of her assistance.

4. I contacted the Welfare Department in Mrs. Negron's behalf and requested to know why her case was terminated. An employee informed me that the reason was because her husband was residing with her.

5. I asked the employee whether this was recorded in the case records.

6. He consulted the case records and stated to me that the reason in the record was that Mrs. Negron was living in Philadelphia.

7. When questioned by me the employee could not reconcile this inherent contradiction.

8. We informed the employee that Mrs. Negron was not in Philadelphia, but as of this date her case has not been reopened.

9. The worker informed me that no written notification of termination or intend to terminate was sent to Mrs. Negron.

Marian Davidson
MARIAN DAVIDSON

Sworn to before me this
14th day of June, 1968.

DAVID GILMAN
Notary Public, State of New York
No. 31-4692,035
Qualified in New York County
Commission Expires March 30, 1969

EXHIBIT A

Exhibit B Annexed to Foregoing Complaint

Notice of Suspension of Public Assistance to Mr. and Mrs. Mack Fuller Dated December 26, 1967

(See Opposite ☞)

THE CITY OF NEW YORK
DEPARTMENT OF WELFARE

W.C. Edmund Carter
Address 100 Jamaica Ave
Brklyn NY 11207

NOTICE OF SUSPENSION OF PUBLIC ASSISTANCE

Head Mrs Mack Smith
208 Varendon Rd.
Brklyn NY 11226

TADC 1744994
Case Number

Your regular ____ twice monthly ____ grant

will be suspended beginning with the check of 11/61

because:

1. Your repeated failure to make adequate search for employment
2. Failure on 10/19 & 10/20 to accept job offered by Emp. Development Division
3. Failure to keep appointment at our office on 10/22.
4. Failure to adequately explain circumstances of home in which you reside

In order that assistance may be resumed it will be necessary for you to:

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

Unit Supervisor ____ 10/26/61 Date ____ 693 Caseload No.

AVISO DE SUSPENSION DE AYUDA PUBLICA

Su asignación corriente ha sido suspendida comenzando con el cheque que se indica y por las razones que se expresan. Para que la ayuda pueda reanudarse deberá cumplir Ud. con las instrucciones que aquí se le dan.

El folleto que se le proporcionó cuando hizo su solicitud explica las condiciones que se requieren para conceder esta clase de ayuda y los derechos que a Ud. le asisten en lo que respecta al reexamen de esta decisión.

Exhibit C Annexed to Foregoing Complaint

Notice of Discontinuance of Public Assistance to Mr. and Mrs. Mack Fuller Dated December 28, 1967

(See Opposite ☞)

F

THE CITY OF NEW YORK
DEPARTMENT OF WELFARE
W.C.
Address Sherwood Center
102 Lawrence St.
Bklyn NY 11201

NOTICE OF DISCONTINUANCE OF PUBLIC ASSISTANCE

Mr/Mrs Mack Smith
3508 Nostrand Ave.
Bklyn NY 11226

IADC 1444494
Case Number

Our investigation shows that effective immediately you are not eligible to receive
Temporary Aid to Dependent Children
for the following reasons: Refusal to accept employment offered by our employment division

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

Enclosed is a booklet describing the Medical Assistance Program as provided by the New York State Medicaid Program. If you wish to apply for Medical Assistance please fill out the two forms in the booklet, the "Application for Medical Assistance" (Form MA-11) and "Certification of Medical Expenditures". Return the completed forms in the self-addressed envelope.

If you do not wish to apply for Medical Assistance, you are required to return your Medical Assistance Identification Card. It is unlawful to use this Card unless you are receiving Medical Assistance.

If you have any questions about the Medical Assistance Program, you may contact the Bureau of Community Medical Services at 330 West 34th Street, New York City, telephone 594-3050.

[signature] 12/15/65 693
Date Supervisor Date Caseload No.

EXHIBIT C

Exhibit D Annexed to Foregoing Complaint

Decision After Fair Hearing in *Matter of Magdelena Mulei*

(See Opposite ☞)

In the Matter of the Appeal of : DECISION
: AFTER
MAGDELENA MULEI : FAIR
: HEARING
from a determination by the New York City Depart-:
ment of Social Services (hereinafter called the :
agency)

A fair hearing was held at 117 Liberty Street, New York City, on March 21, 1968, before S. Gerald Ducker, Referee, at which the appellant, the appellant's representative and representatives of the local agency appeared. The appeal is from a determination by the local agency relating to the suspension of a grant of Aid to Dependent Children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

1) The appellant's grant of Aid to Dependent Children, was suspended effective March 16, 1968.

2) Subsequently, the appellant's grant was reinstated, effective the same date as the date of suspension, namely, March 16, 1968.

3) At the hearing, the agency indicated that it intended to discontinue assistance and close the case but that it was withholding its action pending the outcome of this appeal.

In view of the full reinstatement of the appellant in assistance effective as of the date of suspension, there is no issue to be reviewed at this time. The agency's proposal, to withhold its intended discontinuance of assistance until the outcome of the appeal, is not an authorized procedure. Such procedure would be, in effect, a Fair Hearing prior to discontinuance. There is nothing in the Social Services Law, Rules of the State Board of Social Welfare, or the Regulations of the State Department of Social Services that authorizes, or makes provision for, a prior Fair Hearing. This is not to be confused with the agency's obligation to afford an appellant an opportunity for a review of a case prior to discontinuance in accordance with the provisions of Section 351.26 of the Regulations and the agency's attention is specifically directed to this regulation, which became effective March 1, 1968.

DECISION: There is no issue to be decided.

Albany, New York
, 1968

Exhibit E Annexed to Foregoing Complaint

Notice of Intent to Suspend Public Assistance in the Case of Mrs. Magdelena Mulei

(See Opposite ☞)

K

DEPARTMENT OF SOCIAL SERVICES
Center St. Nicholas 69 Center
Address 132 West 125 St.

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE
(Prepare in Triplicate)

Mrs. Magdalena Mulet
144 West 109 St. (apt 5w)
New York City 10025
NY

ADC 1864859
Case Number

This is to advise you that this Department intends to ☐ SUSPEND ☑ DISCONTINUE your public assistance grant on June 4 1968, for the following reasons:

the Contribution of Mr. Suarez in addition to the money earned by Mr. Mulet is more than sufficient to meet the Children's needs.

If you feel that your public assistance grant should not be suspended or discontinued, you may request a review of your record by a Review Officer on or before June 4, 1968. You may also submit any statement or document which may establish your need for public assistance. You have the right to submit this written material through an attorney or any representative of your choosing.

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No.1: ☐ I REQUEST A REVIEW Box No.2: ☐ I DO NOT REQUEST A REVIEW

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

After this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

Juliette Hochhauser 5/27/68 57-3
Unit Supervisor Date Caseload No.

Form W-[illegible] (Rev.)
3/68

Exhibit F Annexed to Foregoing Complaint

Notice of Discontinuance of Public Assistance in the Case of Mrs. Maria Fuentes

(See Opposite ☞)

DEPARTMENT OF SOCIAL SERVICES

Center: YORKVILLE [illegible]
Address: 154 East 86th Str[illegible]
New York 21, N. Y. [illegible]

NOTICE OF DISCONTINUANCE OF PUBLIC ASSISTANCE

MRS. MARIA FUENTES
911 FDR DRIVE
NEW YORK K. N. Y.

ADC 1611464
Case Number

Our investigation shows that effective immediately you are not eligible to receive Public Assistance

for the following reasons: You have a large sum of money in the bank for which you were unable to give a satisfactory explanation.

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

You may continue to use your Medical Assistance Identification Card, when you need medical services, until the expiration date noted on the card. After that time, and if you are in need of medical services, it will be necessary for you to apply for a new Medical Assistance Identification Card at the Bureau of Community Medical Services, 330 West 34th Street, New York City, N.Y. 10001.

Richard Harmon — Unit Supervisor
3/5/68 — Date
17-4 — Caseload No.

Form D-2b (Issue) [illegible]

CANCEL

Exhibit G Annexed to Foregoing Complaint

Decision After Fair Hearing in the Case of Maria Fuentes

(See Opposite ☞)

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

MARIA FUENTES

from a determination by the New York City Department of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

in case 8

A Fair Hearing was held at 117 Liberty Street, New York City on March 29, 1968, before Frederick Goldfeder, Referee, at which the appellant, the appellant's representative and representatives of the local agency appeared. The appeal is from a determination by the local agency relating to the discontinuance of a grant of Aid to Dependent Children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

At the hearing, it was established that the agency had not actually discontinued the grant of assistance to the appellant. Although the agency intends to discontinue assistance and close the case, it is withholding its action pending the outcome of this appeal. In the meantime, the appellant has been receiving her full assistance grant.

In view of the fact that there has been no actual discontinuance of the grant of assistance, there is no issue to be reviewed at this time. The agency's proposal to withhold its intended discontinuance of assistance until the outcome of the appeal is not an authorized procedure. Such procedure would be, in effect, a Fair Hearing prior to discontinuance. There is nothing in the Social Services Law, Rules of the State Board of Social Welfare, or the Regulations of the State Department of Social Services that authorizes, or makes provision for, a prior Fair Hearing. This is not to be confused with the agency's obligation to afford an appellant an opportunity for a review of a case prior to discontinuance in accordance with the provisions of Section 351.26 of the Regulations and the agency's attention is specifically directed to this regulation, which became effective March 1, 1968.

DECISION: There is no issue to be decided.

Dated: Albany, New York
APR 30 1968

COMMISSIONER

Exhibit H Annexed to Foregoing Complaint

Affidavit of Minnie Porter

(See Opposite ☞)

Affidavit of Minnie Porter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN KELLY, et al., Plaintiffs,	
RUBY SHEAFE, et al., Plaintiffs,	
and	
THERESA NEGRON, et al., Intervenors-Plaintiffs,	68 Civ 394 68 Civ 864
vs.	
GEORGE K. WYMAN, et al., Defendants.	

STATE OF NEW YORK)
COUNTY OF THE BRONX) ss.:

MINNIE PORTER, being duly sworn, deposes and says:

1. I am an employee of the Hunts Point Community Corporation, 953 Southern Boulevard, Bronx, New York and make this affidavit in support of the motion of Mrs. Minerva Rodriguez for leave to intervene as a plaintiff in the above-entitled action.

2. On or about June 12, 1968, Mrs. Minerva Rodriguez came in to our office to seek assistance in connection with the termination of her public assistance grant. She had spoken with other persons in this office prior to that time.

3. I telephoned Mr. Smith, Mrs. Rodriguez's caseworker at the Melrose Welfare Center, and inquired about the reason for

the termination of public assistance to Mrs. Rodriguez. Mr. Smith related to me that he had visited the Rodriguez home early in May and found no one at home. Furthermore, he had visited the home on May 21st or May 22nd and Mrs. Rodriguez was not there. However, he spoke with a woman taking care of children in the apartment. He said that the woman did not speak English well at all and that the conversation was a very difficult one. He asked where Mrs. Rodriguez was and the woman indicated that she did not know. He then inquired if Mrs. Rodriguez lived in the apartment and the woman, he said, replied no. For this reason the case was terminated. Mr. Smith claimed that a notice had been sent around May 27.

4. Mr. Smith further indicated that the case was now out of his hands and that further aid could only be obtained by a new application.

MINNIE PORTER

Sworn to before me this
14 day of June, 1968.

Notary Public

RICHARD E. KWASNIK
Notary Public, State of New York
No. 31-2223512
Qualified in New York County
Commission Expires March 30, 1969

Exhibit I Annexed to Foregoing Complaint

Decision After Fair Hearing in the Case of Ina Sidor

(See Opposite ☞)

In the Matter of the Appeal of

INA SIDOR

from a determination by the New York City Department of Social Services (hereinafter called the agency)

DECISION AFTER FAIR HEARING

A fair hearing was held at 270 Broadway, New York City on December 4, 1967, before Frederick Goldfeder, Referee at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the suspension of a grant of Aid to Dependent Children effective August 16, 1967 to October 16, 1967. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

1) The appellant's application for public assistance made April 12, 1967 was accepted May 4, 1967. At the time of acceptance of the application the appellant owned an automobile. The automobile was purchased by the appellant's mother, who is self-sustaining, and all operating expenses were paid for by the appellant's mother. The agency did not require that the automobile be disposed of or that the agency be given a lien thereon.

2) Assistance was suspended August 16, 1967, because of "failure to comply with Department resource policy".

3) At the hearing, the agency gave as its reason for suspending assistance that the appellant's mother should rather than paying automobile expenses, pay for items of general need. The agency also contended that the appellant owned shares of stock in an insurance company.

4) The appellant owned no stock and was willing to authorize the agency to contact the attorney who represented her in a matrimonial act. [illegible] to obtain any information the agency wanted, and the appellant duly [illegible] the agency's financial investigation.

5) The automobile was re-registered in the mother's name, and thereafter assistance was restored effective October 16, 1967.

6) The appellant incurred debts for living expenses during the period of time in which assistance was suspended.

Ownership of personal property does not, in and of itself, make one [illegible] for public assistance. However when the equity in such property

eligible for public assistance unless the conditions set forth in section 352.8 of the Regulations of the State Department of Social Services, are found to exist. The agency does not contend that the appellant's equity in the automobile exceeded the amount established by it as a burial reserve, and therefor ownership of the automobile did not make the appellant ineligible for assistance.

Where the agreed-upon intent of a nonlegally responsible relative limits the use of cash income the social services agency is required, by section 352.7 (b) (1) to abide by such restrictions. The appellant's mother is a non-legally responsible relative and the agency was required to abide by her imposed restriction of money i.e., payment for automobile expense.

There was accordingly, no basis for the suspension of the appellant's grant.

DECISION:

The agency's action in suspending assistance effective August 16, 1967 was in error and is hereby reversed.

The agency is directed to issue a grant to meet verified debts incurred by the appellant for items of need during the period of suspension and to report to the Area 6 Office of the New York State Department of Social Services its actions pursuant to this decision and section 356.4 (e) of the Regulations of the State Department of Social Services.

Dated: Albany, New York
MAR 7 1968

COMMISSIONER

Exhibit J Annexed to Foregoing Complaint

Notice of Change in Grant to Mrs. Confesora Oyola

(See Opposite ☞)

THE CITY OF NEW YORK
DEPARTMENT OF WELFARE

W.C. Address

Department of Welfare
Non Residence Welfare Center
119 West 31st Street
New York, N. Y. 10001

554-8997

554-8416

74

Mrs. Confesora Oyola
606 E. 13 St.
N.Y.C. 09, N.Y.

ADC-2629891
Case Number

NOTICE OF CHANGE IN GRANT

arreglar la tarjeta a la Compra para 6 personas

On and after 4/1/68 you will receive $ 24.15 as a half-monthly grant from the Department of Welfare, provided you remain eligible for this assistance.

The change in grant is due to:
Mr. Gomez is employed at this time

If you have any questions about the grant, your Investigator will be glad to arrange an appointment to discuss the details of your budget on which the amount is based.

Unit Supervisor — Date 4/1/68 — Caseload No. 02-1

737-6972

03-5

AVISO DE CAMBIO DE ASIGNACION

En o después de la fecha que se anota, Ud. recibirá la cantidad que aquí se indica por concepto de asignación quincenal, mientras sea elegible para esta clase de ayuda. El cambio en la asignación es por la razón(es) que se hace constar. Si tuviera alguna consulta respecto a la asignación, su investigador hará con agrado una cita para discutir los detalles del presupuesto en que se base ésta.

EXHIBIT J

Exhibit K Annexed to Foregoing Complaint

Notice of Discontinuance of Public Assistance to Mrs. F. Gomez

(See Opposite ☞)

The City of New York

DEPARTMENT OF SOCIAL SERVICES

Center
Address: [redacted] WELFARE CENTER
184 East 99th Street
New York 29, N. Y. Cmld. # 03-5

NOTICE OF DISCONTINUANCE OF PUBLIC ASSISTANCE

Mrs. F. Gomez
606 E. 13 ST.
N.Y.C, N.Y. 10009

ADC 2429891
Case Number

Our investigation shows that effective immediately you are not eligible to receive Public Assistance for the following reasons: Return of husband to home and he is working

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

You may continue to use your Medical Assistance Identification Card, when you need medical services, until the expiration date noted on the card. After that time, and if you are in need of medical services, it will be necessary for you to apply for a new Medical Assistance Identification Card at the Bureau of Community Medical Services, 330 West 34th Street, New York City, N.Y. 10001.

[redacted]
Unit Supervisor

Date

63
Caseload No.

Exhibit L Annexed to Foregoing Complaint

Notice of Intent to Discontinue Public Assistance to Antonio Soto

(See Opposite ☞)

DEPARTMENT OF SOCIAL SERVICES
Center: HARLEM
Address: 260 W 30 ST.

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE
(Prepare in Triplicate)

ANTONIO SOTO
26 88 BROADWAY
NEW YORK, N.Y. 10025

HR 2R5 227
Case Number

This is to advise you that we intend to ☐ SUSPEND ☑ DISCONTINUE your public assistance grant on _____, for the following reasons:

FAILURE TO ATTEND REHABILITATION C.O.C

If you feel that your public assistance grant should not be suspended/discontinued, you may request a review of your record by a Review Officer on or before 6/4/68. You may also submit any statement or document which may establish your need for public assistance. You have the right to submit this written material through an attorney or any representative of your choosing.

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No.1: ☑ I REQUEST A REVIEW Box No.2: ☐ I DO NOT REQUEST A REVIEW

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

If after this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

5/28/68 364

Unit Supervisor Date Caseload No.

EXHIBIT L

Exhibit M Annexed to Foregoing Complaint

Letter from Richard Greenberg Dated June 5, 1968

(See Opposite ☞)

June 5, 1968

Mr. Gautier, Case Supervisor
Jacobus U.S.
360 W. 30th St.
New York, N.Y.

RE: Review of the case of
Antonio Soto
2688 Broadway
RE 2195227

Dear Mr:

We represent the above captioned client. On Saturday, June 1, 1968, Mr. Soto received a form JS 5/13/68 dated May 28, 1968. This form letter informed Mr. Soto that his case would be "discontinued" effective June 4, 1968 because of a failure to Attend Rehabilitation C.O.C.S. This letter further states that Mr. Soto has the right to submit written material through a representative of his choosing. Pursuant thereto we submit the following.

Preschemily we object to the fact that:

1) the Notice of May 28, 1968 fails to state with any specificity the grounds on which the proposed discontinuance is to be based.

2) The Notice does not afford Mr. Soto opportunity to orally confront his accusertor or any other person upon whose statements and actions the proposed discontinuance is based.

3) The Notice does not inform us to whom or in what form written material is to be submitted.

After several calls to the Center we were able to determine that the discontinuance was based on Title I of the Social Services Law § 131 (2) and an alleged refusal of Mr. Soto to participate in a rehabilitation program.

Mr. Soto gives the following account of the events leading up to his discontinuance.

EXHIBIT M

1) Mr. Soto received a notice from the Amsterdam Department of Social Services some time after May 22, 1968 which stated:

A) That Mr. Soto was to report to Amsterdam Welfare Center on a certain date,

B) That he was to see a C.O.C. representative,

C) and that if he did not keep the appointment, he would no longer be eligible for Public Assistance.

2) Mr. Soto visited Amsterdam Welfare Center on the appointed day. He saw his worker, Mr. Lieberman, and was directed to speak to the Intake worker. The Intake worker informed Mr. Soto that Mr. Torrenzere could not see Mr. Soto on that day, but would see him the next day. The original notice was kept by the Amsterdam worker.

3) Mr. Soto kept the new appointment. In his discussion with Mr. Torrenzere, Phoenix House was mentioned, but Mr. Soto indicated that he was more interested in job training which Mr. Lieberman had promised on an earlier occasion. Mr. Torrenzere then recommended that Mr. Soto think about Phoenix House, and that if on a later date, he desired to participate in the program, he should contact Mr. Torrenzere at the Amsterdam Center. Mr. Soto was given a 3 X 5 card with Mr. Torrenzere's schedule.

4) Approximately one week later, Mr. Soto received the above Notice of Discontinuance.

5) After visiting our office on June 3, 1968, Mr. Soto was informed that the discontinuance was based on his "refusal" to go to Phoenix House. United Welfare League obtained the address of Phoenix House and Mr. Soto visited Mr. Torrenzere at Phoenix House that afternoon. Mr. Soto also visited Phoenix House on June 4, 1968.

6) At the Phoenix House discussions Mr. Soto indicated that he did not wish to participate in a "live-in" program. He cited his earlier bad experience with the program at Hart Island. Mr. Soto further indicated that he was willing to participate in a day care program, but was informed that they did not desire his participation to the extent that he would be "merely picking up his check". How is full time participation under the threat of a withdrawal of aid would be any more useful especially in light of Mr. Soto's former unsuccessful "rehabilitation" at Hart Island, was not made clear.

Mr. Cassler, Case Supervisor
Amsterdam Welfare Center

-2- June 5, 1968

Re: Antonio Soto
2688 Broadway
HR 2195277

It is, therefore, unclear to us how this conduct can be construed as

1) a lack of cooperation on Mr. Soto's part, or

2) a refusal to accept medical care.

We reported, that Mr. Soto is willing to accept either

1) job training

2) a day care rehabilitation program which is staffed by professionals.

We therefore find the proposed discontinuance unjustified and request that it be reversed on review.

We request access to all records used in this review and an opportunity to submit further written or oral answers to any material of an affirmative or rebuttal character submitted by the Department of Social Services.

Sincerely yours,

Richard Greenberg

RG:mh

cc: Columbia Center on Welfare Policy and Law

Exhibit N Annexed to Foregoing Complaint

Notice of Decision, After Review, to Discontinue Public Assistance to Antonio Soto

(See Opposite ☞)

DEPARTMENT OF SOCIAL SERVICES

Center: AMSTERDAM S.S.C.

Address: 360 W 30 ST.

York

NOTICE OF DECISION, AFTER REVIEW, TO DISCONTINUE PUBLIC ASSISTANCE

[illegible] SOTO
[illegible] BROADWAY
[illegible] YORK, N.Y.

HR 2195-222
Case Number

[illegible] careful consideration by a Review [illegible] of all the factors and documents you presented, [illegible] soon decided that effective immediately you are not eligible to receive HOME RELIEF for the following reasons [illegible] KEPT APPOINTMENTS AT [illegible] CENTER C.S.C. APPOINTMENT 5/23/68 WAS KEPT BUT [illegible] SINCE THAT TIME REGULAR ATTENDANCE

[illegible] wish to review the pamphlet which was given to you at the time of your application. It [illegible] the provisions under which this type of public assistance is granted and your rights [illegible] respect to review of this decision.

[illegible] dissatisfied with this decision you may request a Fair Hearing, in writing or orally, [illegible] communicating with the State Department of Social Services, 270 Broadway, New York, N.Y. [illegible] Telephone Number 488-6550.

[illegible] soon receive information concerning your eligibility for continued assistance under the [illegible] Assistance Program as provided by the New York State Medical Program.

[illegible]
Unit Supervisor

6/6/68
Date

364
Caseload No.

EXHIBIT IV

[illegible] of [illegible]

Exhibit O Annexed to Foregoing Complaint

Review of Case of Antonio Soto

(See Opposite ☞)

229a

June 11, 1968

Unit 36

MR: SOTO, Antonio
1688 Broadway
New York, N.Y.
[illegible] - (gold 4th)
OCCUPATION: Attorney - [illegible]

R. Gaeckler, Case Supvr.
Senior Officer
Amsterdam W.C.

STATUS OF [illegible] CASE [illegible]

Mr. Soto has been an active drug user for over 15 years. He has a long history of incarceration for drugs and drug related crimes. Client claimed that he has only served 5 years in his lifetime.

Mr. Soto was determined at least 5 times. He was referred to several rehab programs including Addicts Rehab. Greenwich House, and never attended on a regular basis. After he was determined in 1967 he entered the ARA program at Harts Island. He was there from 5/3/67 to 6/8/67. Mr. Soto was "thrown out" the program for failure to cooperate or to respond to the program. They referred to Mr. Soto as a "parasite".

On 5/17/68 Mr. Soto was requested to come to the Unit to discuss a rehab program mainly the ARA program. Mr. Soto failed to see, this appt. He was given another appt. for 5/20/68. Mr. Soto kept this appt. He was informed that he could re-enter the ARA program and that he would have to keep daily appts with a C.O.C. Mr. Soto was informed that if he did not cease [illegible] his case would be closed. Mr. Soto failed to keep these appts. The C.O.C. worker who interviewed Mr. Soto at the V.E. indicated that Mr. Soto was "playing a game" with us and Mr. Soto is not interested in rehab. Mr. Soto informed the C.O.C. worker that he worked and his fee, though he did that he didn't want to be bothered with rehab. The C.O.C. worker also [illegible] that Mr. Soto was still using drugs & definitely needed to be in a program.

On 6/3/68 a letter was received from United Welfare League concerning the project of closing. They indicated that Mr. Soto did not particularly want rehab but instead need job training. Mr. Soto also wished no part of a "limb-in" program since he had a previous bad experience the Phoenix House program of ARA. Mr. Soto did according to the United Welfare League agree to participate in a day care rehabilitation program staffed by professionals.

In view of the above information concerning Mr. Soto's current drug use I feel that job training is not appropriate at this time, and rehab must come first. Mr. Soto has been given ample opportunity to become involved in a rehab. agency. To date, he has only done this on a token level. Mr. Soto had expressed a desire to attend Greenwich House Counseling Center but he has never attended.

It is therefore my recommendation that the case be closed for failure to cooperate. Soto is ineligible based on Social Services Law 131 (5b), NYC and State Department regulations 351.3, 360.2 (7).

GJR

Exhibit P Annexed to Foregoing Complaint

Letter to Mrs. Mary Holmes Dated May 22, 1968

(See Opposite ☞)

The City of New York

DEPARTMENT OF WELFARE
AMSTERDAM WELFARE CENTER
260 WEST 30TH STREET, NEW YORK, N. Y. 10001

In Reply, Refer To
554-

Telephone No.

May 22, 1968

Mrs. Mary Holmes
111 West 102 Street, Apt. 1B
New York, New York 10025

ADC 2615 689

Dear Mrs. Holmes:

It was unfortunate that you saw fit to hang up on today's conversation, in which we were trying to advise you on what you should do in this current instance of misuse of funds.

As you know, you were issued the amount of $278.00, on 5/15/68. This was issued in order that you could pay broker's fee and security deposit, in the amount of $110.00 each, plus the difference between the old and the new rents, for the period 5/16-5/31/68, in the amount of $58.00. After you were unable to obtain the apartment, these funds should have been returned to the Department; they were not to be used for any other purpose.

You have refused to do this and have admitted you have spent at least a portion of these funds for other items. We were trying to suggest to you, when you so rudely hung up, that it would be necessary for you to <u>verify</u> these expenditures <u>before</u> assistance can be continued. We are again suggesting that you return to the store in which you bought the bed and obtain a receipt for it; the receipt should then be brought into the Center. Likewise, all other expenditures, <u>from the grant in question only</u>, will have to be itemized and verified.

Your regular grant for the period 6/1-6/16/68 is being returned to this office. It will be necessary for you to bring in the requested verification before it is released to you. May we again request that you bring in verification for the amount already spent, and refund the balance as previously requested, as quickly as possible. This will 1) preclude any delay in your continued assistance; 2) assure reissuance of rent, security, etc., when you locate another apartment; and, 3) avoid possible suspension of your case.

We would greatly appreciate your cooperation.

Very truly yours,

HARRISON BLACKWELL, JR.,
Case Supervisor

EXHIBIT F

HB/em

Exhibit Q Annexed to Foregoing Complaint

Notice of Intent to Discontinue Public Assistance to Mary Holmes

(See Opposite ☞)

The City of New York

DEPARTMENT OF SOCIAL SERVICES
Center: Hamilton W.C.
Address: 260 W 30th St. N.Y 10001, N.Y

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE
(Prepare in Triplicate)

MARY HOLMES
11½ W 102ND ST.
APT 1B
NEW YORK, NEW YORK 10025

AOC 2615689
Case Number

This is to advise you that this Department intends to ☒ SUSPEND ☐ DISCONTINUE your public assistance grant on 6/1/68, for the following reasons:

FAILURE TO EXPLAIN MANAGEMENT IN REGARD to GRANTS ISSUED ON 5/15/68, SPECIFICALLY FOR SECURITY DEPOSIT AND BROKERS FEE, AND to VERIFY PURCHASES MADE WITH THESE FUNDS.

If you feel that your public assistance grant should not be suspended or discontinued, you may request a review of your record by a Review Officer on or before 6/3/68. You may also submit any statement or document which may establish your need for public assistance. You have the right to submit this written material through an attorney or any representative of your choosing.

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No. 1: ☐ I REQUEST A REVIEW Box No. 2 ☐ I DO NOT REQUEST A REVIEW

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

After this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N.Y. 10007, Telephone Number 488-6550.

[signature]
Unit Supervisor

5/27/68
Date

28-5
Caseload No.

* [illegible]

Exhibit R Annexed to Foregoing Complaint

Notice of Discontinuance of Public Assistance to Mary Holmes

(See Opposite ☞)

235a

Exh. R, etc.

The City of New York

DEPARTMENT OF SOCIAL SERVICES

Center Address: Amsterdam HC 760 W 30th ST NY 10001, NY

NOTICE OF DISCONTINUANCE OF PUBLIC ASSISTANCE
(Prepare in Duplicate)

MARY Nolmes
111 W 102nd ST
New York 10025, NY

2615689
ADC ~~2600473~~
Case Number

Our investigation shows that effective immediately you are not eligible to receive

Public Assistance

for the following reasons:

Failure to explain management in regard to grant issued on 5/68 and Failure to comply with policy in regard to explanation of management.

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway New York, N.Y. 10007, Telephone Number 488-6550.

You will soon receive information concerning your eligibility for continued assistance under the Medical Assistance Program as provided by the New York State Medicaid Program

L. Tompkins — 4/3/68 — 225

Unit Supervisor — Date — Caseload No

Form M-34* (Revs)
Rev. 5/13/68

Plaintiff-Intervenors' Motion for Preliminary Injunction

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff-intervenors move for a preliminary injunction restraining the Defendant Goldberg from withholding regular recurring semi-monthly grants from the named plaintiff-intervenors unless and until the decision of the New York City Department of Social Services to suspend or terminate aid has been sustained by Defendant Wyman after a fair hearing, on the ground that plaintiff-intervenors are suffering, and will continue to suffer, irreparable injury unless aid is restored, as is set forth in plaintiff-intervenors' verified complaint submitted herewith and the attached affidavit of Lee A. Albert. Plaintiff-intervenors anticipate that this relief will not be necessary in light of the City's previous response in this case to the earlier motions for preliminary injunction. Said response was to voluntarily restore assistance to the named plaintiffs pending the determination of this lawsuit without an order of this Court. It is only in the absence of a similar response to this motion that there will be an occasion for a preliminary injunction.

/s/ Lee A. Albert
Henry A. Freedman

Martin Garbus

Attorneys for Intervenor-Plaintiffs

Motion for Prleiminary Injunction

NOTICE OF MOTION

To:

Louis J. Lefkowitz
Attorney General of the
State of New York

J. Lee Rankin
Corporation Counsel of the
City of New York

Attorneys for Defendants

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 1505, United States Courthouse, Foley Square, City of New York on the 26th day of June, 1968 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ Lee A. Albert
Henry A. Freedman

Martin Garbus

Attorneys for Plaintiffs

Motion to Dissolve Stay of Discovery and to Produce Under Rule 34

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs in the above entitled actions move this Court pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure to dissolve the stay of any and all discovery and inspection pending the hearing by the court of three judges on June 26, 1968 entered by the Honorable Frederick VanPelt Bryan in the amended order of June 11, 1968 and to allow plaintiffs to proceed to take the depositions of officials of the New York State and City Departments of Social Services and to submit interrogatories to said departments. Plaintiffs also move this court to order production and inspection pursuant to Rule 34, as is more fully set out herein.

Plaintiffs in the above-entitled action move this court pursuant to Rule 34 of the Federal Rules of Civil Procedure for an order requiring the defendant George K. Wyman to produce and to permit plaintiff to inspect and to copy each of the following documents:

(1) All fair hearing decisions in cases in which termination or suspension of a public assistance grant (federally financed and Home Relief) was an issue during the period from January 1, 1967 through July 1, 1968, along with the notice of termination or suspension in each case; the request, if written, for a fair hearing in each case; the "full reports" on the matter submitted by the local department of social services to the state department of social services, pursuant to 18 N.Y.C.R.R. §356.4(6) (prior to amendment

of March 1, 1968); the transcripts of said hearing; and the referee's summary of evidence and report in such proceedings. The names of recipients and other identifying data may be excised if deemed appropriate.

(2) All notices of proposed suspension or termination pursuant to 18 N.Y.C.R.R. §351.26 from March 1, 1968 to July 1, 1968. The names of recipients and other identifying data may be excised if deemed appropriate.

(3) Copies of all letters, memorandums, and complaints, formal and informal, received by the New York State Department of Social Services from January 1, 1967 to July 1, 1968 regarding delay in scheduling a fair hearing; delay in conducting a fair hearing; objections by recipients to adjournment of a fair hearing; delay in rendering the fair hearing decision; and delay in implementing the fair hearing decision. The names of recipients and other identifying data may be excised if deemed appropriate.

(4) All reports of the New York City Department of Social Services filed with the New York State Department of Social Services pursuant to 18 N.Y.C.R.R. §84.20 from January 1, 1967 until July 1, 1968 regarding implementation of fair hearing decisions of general applicability. The names of recipients and other identifying data may be excised if deemed appropriate.

(5) All reports of the New York City Department of Social Services sent to the area office of the New York State Department of Social Services from March 15, 1968 through July 1, 1968 pursuant to 18 N.Y.C.R.R. §358.5 (f) in cases of suspension or termination and the concise summary of case pursuant to 18 N.Y.C.R.R. §358.5(g). The names of recipients and other identifying data may be excised if deemed appropriate.

(6) All monthly statistical reports furnished by the New York City Department of Social Services to the New

Motion to Dissolve Stay of Discovery and to Produce Under Rule 34

York State Department of Social Services from January 1967 through July 1968 pursuant to 18 N.Y.C.R.R. §651.1 providing Home Relief data on form HR-33 consisting of "analysis of cases closed during the month by reason of closing."

(7) All reports furnished by the New York City Department of Social Services to the New York State Department of Social Services pursuant to 18 N.Y.C.R.R. §651.2 from January 1, 1967 through July 1, 1968 showing the monthly movement of and disposition of cases in the ADC program.

(8) All reports furnished by the New York City Department of Social Services to the New York State Department of Social Services pursuant to 18 N.Y.C.R.R. §651.4 from January 1, 1967 through July 1, 1968 showing the monthly statistical report on reasons for closing public assistance cases in the ADC and HR programs.

(9) All reports and findings in case eligibility in surveys undertaken by the New York State Department of Social Services pursuant to 18 N.Y.C.R.R. §325.1 from January 1, 1967 through July 1, 1968, including any evaluation of the administrative and supervisory functions that affect quality of agency performance.

(10) The monthly reports of the New York City Department of Social Services on form QC 109 submitted to the Office of Social Research and Statistics, State Department of Social Welfare, Albany, New York, during the period January, 1967 through July 1, 1968.

Defendant George K. Wyman, as Commissioner of the New York State Department of Social Services, has the possession, custody, or control of each and every one of the foregoing documents. Each of them constitutes or contains evidence and relevant material to a matter in-

Motion to Dissolve Stay of Discovery and to Produce Under Rule 34

volved in this action, as is more fully shown in the affidavit and memorandum of law in support of this motion.

Plaintiffs in the above-entitled action move this court pursuant to Rule 34 of the Federal Rules of Civil Procedure for an order requiring the defendant Jack R. Goldberg to produce and to permit plaintiff to inspect and to copy each of the following documents:

(1) All notices of suspension or termination and of proposed suspension or termination sent to recipients of public assistance in New York City under the AFDC, H.R., A.D., O.A.A., and A.B. programs during the period January 1, 1968 through July 1, 1968. The names of recipients and other identifying data may be excised if deemed appropriate. This applies to each item requested herein.

(2) Copies of all decisions prepared by case supervisor or other review officer in local review of case closings pursuant to 18 N.Y.C.R.R. §351.26 and New York City Procedure 68-18, dated May 21, 1968.

(3) Copies of all memorandums, directives, procedurals, reports, and correspondence regarding 18 N.Y.C.R.R. §351.26 as promulgated on February 15, 1968 and on April 26, 1968.

(4) Copies of all training materials, directives and reports used in connection with the implementation of 18 N.Y.C.R.R. §351.26 and N.Y.C. Procedure 68-15.

(5) Copies of the lists and records of case actions and case closings for all federally-financed public assistance programs pursuant to 18 N.Y.C.R.R. §326.2.

(6) The case records of the named plaintiffs and plaintiff-intervenors. The names and other identifying data of all non-departmental sources of information may be excised if deemed appropriate.

Motion to Dissolve Stay of Discovery and to Produce Under Rule 34

Defendant Jack R. Goldberg, as Commissioner of the New York City Department of Social Services, has the possession, custody, or control of each and every one of the foregoing documents. Each of them constitutes or contains evidence and relevant material to a matter involved in this action, as is more fully shown in the affidavit and memorandum of law in support of this motion.

Lee A. Albert
Henry A. Freedman

Martin Garbus

NOTICE OF MOTION

To:

Louis J. Lefkowitz
Attorney General of the
State of New York

J. L. Rankin
Corporation Counsel of the
City of New York

Attorneys for Defendants

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 1505, United States Courthouse, Foley Square, City of New York on the 26th day of June, 1968 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard.

Lee A. Albert
Henry A. Freedman

Martin Garbus

Motion for Leave to Amend Complaint

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs move this Court for an order amending the complaints in the above-entitled cases as follows:

Paragraph II of both complaints is amended to read as follows:

> This is a proper case for determination by a three-judge court pursuant to Title 28 U.S.C. 2281 and 2284, in that it seeks an injunction to restrain the defendants from applying, enforcing, executing and implementing Sections 213(2), 214, 304, 325, 350(2)(b), and 353(2) of the New York Social Services Law, Sections 84.2-84.24 and 351.26 of Volume 18, Official Compilation of Code, Rules and Regulations of the State of New York (hereafter referred to as 18 N.Y.C.R.R.), and related statutes, rules and regulations, insofar as these statutes and regulations require termination or suspension of financial aid in the form of public assistance [Aid to Families with Dependent Children (AFDC), Aid to the Aged, Blind and Disabled (AABD) and Home Relief (HR)] prior to the granting or adequate notice and opportunity for a hearing which meets due process standards, and without the provision at any appropriate time of a hearing meeting due process standards, on the grounds of the invalidity of said statutes and regulations under the Constitution and laws of the United States.

Paragraph III of both complaints is amended to read as follows:

Motion for Leave to Amend Complaint

This action seeks an injunction and declaratory judgment restraining the enforcement of, and declaring unconstitutional, the aforesaid state and statewide rules and regulations, on their face and as applied and interpreted by defendants, on the grounds that said statutes, rules and regulations, and actions taken pursuant thereto, deprive plaintiffs of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and, so far as the AFDC and AABD programs are concerned, deprive plaintiffs of the "fair hearing" guaranteed by the Social Security Act, in that said statutes, rules and regulations deny to plaintiffs an opportunity for a hearing which satisfies due process standards in connection with termination of financial aid under the public assistance program at any appropriate time.

Paragraph XV of the *Kelly* complaint and Paragraph XI of the *Sheafe* complaint are amended to read as follows:

Sections 213(2), 304, 325 and 353(2) of the New York Social Services Law, and 18 N.Y.C.R.R. Sections 82.2 through 82.23 and 356.4, prescribing the hearing procedure in the public assistance program, and Sections 214, 304(6), 325 and 350(2) (b) and 18 N.Y.C.R.R. 351.22 and 351.26 prescribing the manner of termination or suspension of aid in the public assistance program, on their face, and as interpreted and applied to plaintiffs and members of their class, deprive the plaintiffs of the due process of law guaranteed by the Fourteenth Amendment to the extent applicable, of the "Fair Hearing" guaranteed by the Social Security Act in that

1. Under the prior review procedure pursuant to 18 N.Y.C.R.R. §351.26:

a) The recipient is inadequately advised of the reason for termination.

b) The recipient is not advised of the regulations and rules relied on for termination.

c) The recipient is not advised of the evidence upon which the department is relying for its decision.

d) The recipient is afforded no opportunity to reply, in that New York allows seven calendar days from the date the proposed termination is mailed for receipt of the legal case, letter and all documents of the recipients.

e) The recipient is restricted to presentation of documentary evidence only, not withstanding that many recipients and witnesses are illiterate.

f) The recipient is able neither to determine or confront the source of information used against him.

g) Even when the issue is one solely of credibility, no opportunity whatever for cross-examination is provided.

h) The review officer, who is a full time "case supervisor" in the Department hierarchy, has had substantial and continuing involvement with the recipient's case, has personally rendered many decisions in that recipient's case in the past, and may well have participated informally and formally, in the decision to terminate aid which he is asked to review.

i) Review officers have delegated their review functions, including the writing of the decision to the unit supervisor responsible for the decision to terminate aid then under review.

j) Review officers have received no training whatever in the manner in which to conduct review, and have had the review function added to their

regular duties without any compensating reduction of duties.

k) Employees designated as review officers have objected to this function on the ground that they cannot be impartial.

l) Review can be avoided entirely by a "finding" that the recipient's whereabouts are unknown or that the recipient has left the state.

2. The subsequent "fair hearing" is not held at an appropriate time, since

a) The hearing is generally not commenced for at least several weeks after a request, despite the fact that no emergency aid is granted.

b) Hearings are adjourned without date at noon or 3 or 5 p.m., after an hour or so, or if the City is unprepared, regardless of hardship, and are rescheduled three to six weeks later.

c) Decisions are generally not rendered for several months after the hearing is closed, regardless of hardship.

d) Compliance with decisions favorable to recipients is tardy and grudging.

3. The "fair hearing" is procedurally deficient, since

a) Documents are submitted in advance to the referee and not made available to the recipient.

b) The City's entire case often depends upon excerpts from the case record which it selects. The record is not made available to recipients even if clearly favorable material is contained therein.

c) The City's entire case is often presented by persons with no personal knowledge of the facts to which they are testifying.

4. The systematic administrative practices utilized in New York review procedures are contrary to provisions of 42 U.S.C. §602(a)(4) and the purposes of the said Social Security Act.

Dated: New York, New York
June 17, 1968

Lee A. Albert
Henry A. Freedman

Martin Garbus

NOTICE OF MOTION

To:

Louis J. Lefkowitz
Attorney General of the
State of New York

J. Lee Rankin
Corporation Counsel of the
City of New York

Attorneys for Defendants

Please take notice that the undersigned will bring the above motion on for hearing before this court at Room 1505, United States Courthouse, Foley Square, City of New York on the 26th day of June, 1968 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard.

Lee A. Albert
Henry A. Freedman

Martin Garbus

Attorneys for Plaintiffs

Affidavit of Lee A. Albert in Support of Foregoing Motion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

LEE A. ALBERT, being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in the District of Columbia. I am Director of the Columbia University Center on Social Welfare Policy and Law, 401 West 117th Street, New York, New York. I am co-counsel for the plaintiffs in the above-entitled actions and made this affidavit in support of plaintiffs' motions to amend their complaint.

2. The *Kelly* complaint was filed January 29, 1968. Within the next few days the defendants moved to change the underlying facts in the case. The city restored plaintiffs Kelly, DeJesus, Frye and McKinney to emergency and, in some cases, full assistance, although such action had been refused prior to the filing of the complaint despite the active intervention of attorneys. Mrs. Guzman's firmly threatened termination failed to materialize once this action was commenced. These plaintiffs continue to be threatened with termination without a procedure comporting with standards of due process since they were reinstated because of the filing of this action and not on the merits of their cases.

3. Defendant also sought to change the legal basis of the suit by adopting on February 15 a new procedure for review of termination decisions, 18 N.Y.C.R.R. §351.26, effective March 1. This change in welfare regulations was adopted after consultation with the attorney general's offices in Mississippi and California, in which similar cases were pending. [See affidavit of Joel Sachs, Assistant Attorney General, dated February 21, 1968.] This, said Mr. Sachs, resulted in "giving plaintiffs precisely the relief they requested" and that the case was therefore moot. Of course plaintiffs had sought far more than §351.26 [see Point I(C) of Memorandum of Points and Authorities].

4. During February the City continued to terminate assistance without any hearing whatever. Their refusal to reconsider their erroneous termination in two cases was so prolonged, despite days of negotiations at the highest levels of the Department, that the *Shaefe* case was commenced to protect Mrs. Sheafe and Mrs. Lett. The treatment of Mrs. Lett was so outrageous, and the suffering caused so severe, that a claim of $50,000 damages for violation of her constitutional rights was made. The case was also brought to demonstrate the continuing availability of plaintiffs. Once the federal action had been commenced, Mrs. Lett, was, slowly, to be sure, given aid. The City Department was absolutely convinced that it was right in terminating Mrs. Sheafe:

> Thus, the Department was required to discontinue because Ruby Sheafe failed to sustain under the law, her burden of establishing her continuing eligibility and she rejected the Department's offer to assist her in establishing such eligibility. The fact therefore must be stressed that if this plaintiff is genuinely eligible for public assistance, her reinstatement to the rolls lies completely in her hands;

> and her previous removal therefrom stems entirely from her own conduct, all of which had been told to her (before and since her removal) by the Department's representatives, and I made her attorney Mr. Gilman thoroughly aware thereof. [Affidavit of Merrill Charlton dated March 25, 1968.]

Only after Commissioner Wyman ruled that the termination was without foundation did the City grudgingly begin to render assistance.

5. State, in giving plaintiffs "precisely the relief they requested," had gone much too far for the City. The City, in an astonishing display of lawlessness, failed to heed the binding state regulation and continued terminations apace without prior review during March and April, when the state regulation was in full force and effect. In this manner did welfare recipients in New York have "precisely the relief they requested" by dint of a state regulation presumably valid on its face.

6. The motions for a three-judge court and to dismiss were submitted for decision on March 19. Shortly thereafter counsel for the City began a newsletter to the Court, relating the attempts of the City to deprive plaintiffs of what the State said was everything wanted by the plaintiffs. The City suggested that the Court delay decision until the City and State could determine just what the law should be anyway. Finally the current so-called review procedure was worked out and a new 18 N.Y.C.R.R. §351.26 was formulated to replace the section in force for two months and not once complied with by the City of New York. On information and belief non-compliance is still the rule in some, if not all, counties of New York City.

7. Plaintiffs determined that discovery would be useless during this period, since the State and City admittedly

had not established, and then had not implemented, a procedure.

8. This passage of time, and the actions of the City, has led to changes of facts which make proper an amendment to the complaint prior to determination of any motions directed at the complaint.

9. Defendants' overt attempts to alter the law upon which this action was commenced suggests the advisability of an amendment of the complaint to reflect the new legal posture in which plaintiffs and all recipients of public assistance find themselves. The provision, at least on paper, of some procedure at the point of time sought by plaintiffs requires an examination of the implications of the failure to provide the type of procedure which plaintiffs sought at that time. Amendment is appropriate to clarify plaintiffs' contentions. It must be remembered that defendants changed the law and then claimed that the issues had been altered; plaintiffs now seek to reflect the issues of this law suit in the light of defendants' actions.

10. These amendments merely set forth in detail the points in plaintiffs' complaints that defendants have apparently overlooked in claiming that the statutory subsequent review is irrelevant to the issues in this case. For instance, it was stated in the original *Kelly* complaint at Paragraph XV, and in the original *Sheafe* complaint at Paragraph XI, that "The termination and withdrawal of financial aid may, under the present regulations, extend for a period of several months before a hearing is held and a decision is rendered, even though plaintiffs had been receiving such aid and are in vital need of such aid for food, shelter and medical care and even though plaintiffs are prepared to prove that they are and have been eligible."

Mr. Sachs, responding for the State in his affidavit of February 21, 1968, discussed the time sequence of the subsequent fair hearing as support for his due process argument. The State also discussed and relied upon the fair hearing procedures in its Memorandum of Law dated February 26, 1968.

11. This amendment of the complaint will not surprise defendants, for the contentions of plaintiffs were further set forth in their letter of June 5, 1968 to this three-judge court, copies of which were served on defendants. These issues were also discussed at length by counsel for all parties at the conference with Judge Bryan on June 11, 1968.

12. Plaintiffs have been absolutely barred from using any discovery procedures under the Federal Rules made available to all plaintiffs for the purpose of obtaining information necessary to form legal issues and to find out what, in reality, is the procedure used in this City and State. Having been thus precluded, plaintiffs seek to amend their complaint so that they may present more definitively the legal issues in this case, to the end that this controversy may be decided on the merits rather than on the basis of what are, and what plaintiffs will seek, if ever allowed by this court, to prove are, invalid regulations. The detailed failings listed in the amended complaint are all encompassed within the more general language of the original complaint.

13. These amendments will also bring the substantive sections of the complaints in *Kelly* and *Sheafe* into conformity with the complaint of the intervenor-plaintiffs filed with this court on June 17, 1968.

Lee A. Albert

(Sworn to June 15, 1968.)

Affidavit of Lee A. Albert in Support of Foregoing Motion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

LEE A. ALBERT, being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in the District of Columbia. I am Director of the Columbia University Center on Social Welfare Policy and Law, 401 W. 117th Street, New York, New York. I am co-counsel for the plaintiffs in the above-entitled actions and make this affidavit in support of plaintiffs' motions to amend their complaint.

2. These consolidated actions attack the validity of the New York State and the New York City administrative machinery afforded to recipients of public assistance for the resolution of the factual and legal issues underlying a determination to suspend or terminate a regular, recurring public assistance grant. As stated in the complaint in *Sheafe* v. *Wyman*, 68 Civ. 864, "this action seeks an injunction and declaratory judgment restraining the enforcement of, and declaring unconstitutional, * * * state statutes and statewide rules and regulations, on their face and as applied and interpreted by defendants, on the grounds that said statutes, rules and regulations, and actions taken pursuant thereto, deprive plaintiffs of the due process of law

guaranteed by the Fourteenth Amendment to the United States Constitution." The essence of the plaintiffs' claim has been and continues to be that the State Department of Social Services and the City Department of Social Services fail to provide recipients of public assistance an adequate review mechanism at an appropriate time for a review of a decision to withdraw a public assistance grant and that such failure denies to the plaintiffs herein and others similarly situated procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

3. During the pendency of the above actions, the New York State and New York City Departments of Social Services have undertaken persistent, albeit slight, changes in the regulations governing review of decisions to terminate or suspend assistance. As a result of these continuing changes, the defendant Departments requested this Court to stay and hold in abeyance the actions pending before it, and requested the plaintiffs to postpone taking the depositions of Commissioners Wyman and Goldberg and to defer other discovery proceedings until the law in New York became settled. The plaintiffs agreed to these requests because of the futility of discovery without knowing the procedures under constitutional attack in this suit.

4. On April 26, 1968 the State Department of Social Services promulgated regulation 351.26, which was acceptable to the City of New York. On May 17, 1968, the Honorable Frederick VanPelt Bryan convened a three-judge court and on May 27, 1968 Judge Bryan entered an order requiring that all motions be made by June 10, 1968 and that said motions be heard on June 26, 1968.

5. Since the entry of these orders, the plaintiffs have attempted to undertake discovery which they deem nec-

essary to the presentation of their claims. As set out more fully in my letter of June 5, 1968, the State and City Departments of Social Welfare have strenuously resisted any and all discovery, on the ground that this case involves "a purely legal determination as to whether the constitutional requirements of due process are satisfied by the provisions of regulation 351.26." In their view, regulation 351.26 provides for notice and a hearing prior to termination of a grant.

6. On June 11, 1968, in the course of a conference in the chambers of Judge Bryan, the defendant Departments informally moved for a protective order staying all discovery until motions are heard and determined by this Court on June 26, 1968. On said date Judge Bryan entered an order which stayed all discovery until this Court determines the motions before it.

7. The plaintiffs seek to submit interrogatories and to depose persons in the Defendant Social Services Departments in order to ascertain facts relating to the administration, interpretation and application of the statutes and regulations under constitutional attack in this case. The Defendants' sole ground for resisting discovery is its view that the administration, interpretation and application of the provisions are irrelevant. In their view, the bare language of the regulations governing review of a decision to terminate is controlling, quite without regard to the systematic, continuous and approved administration of these regulations. The requirements of Due Process of Law are not so vacuous.

7. The Defendants also claim that inquiry into the timing and nature of the subsequent review provided by the State, the so-called "fair hearing," goes beyond the issues

involved in this case. The inadequacy of the State's subsequent review mechanism is alleged in the complaint and the Defendants' claim of constitutionality is largely premised on the availability of such subsequent review. The matters relevant to discovery are not limited by the opposing parties' niggardly reading of the complaint. For the purpose of discovery is to ascertain the issues, to shape them and allow for their proper presentation at trial. To deny discovery based on the defendants' view of the issues in this case is to emasculate plaintiffs' opportunity and right to litigate a federal constitutional claim in a federal court.

8. The matters sought to be discovered are in the exclusive possession and control of the defendants, readily available to the defendants, highly relevant to the issues the plaintiffs seek to present to this Court and necessary to the effective presentation of these issues.

9. The matters sought for production under Rule 34 are documents and official records under the exclusive control of the defendants; contain nothing of a confidential nature; contain highly relevant information regarding the nature and proceedings in termination and suspension of assistance; are not otherwise available to the plaintiffs; and cannot be obtained by any other discovery mechanism.

Lee A. Albert

(Sworn to June 17, 1968.)

Affidavit of Clara Eisner in Opposition to Defendants' Motions for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

CLARA EISNER, being duly sworn, deposes and says:

1. I am at present a public welfare consultant for Mobilization For Youth, 125 Avenue D, New York, New York.

2. From 1934 until 1966, I worked continuously for the New York City Department of Social Services and its predecessors. All but approximately five years of that time I held the position of Senior Case Supervisor (as the position is now called) and, for the other five years, I held the position either of Administrator of a welfare center or case consultation. In addition, I was Senior Case Supervisor of Information and Adjustment at the Central Office. In those capacities, I supervised from 200 to 400 employees at a time.

3. As Senior Case Supervisor or Administrator I reviewed many cases of suspension and termination as well as cases involving computation of amounts of assistance and services which were brought to my attention. As I shall set forth in greater detail, these decisions are quite often made by the Case Supervisors, often on their own

initiative. It was my observation over the years that 99 per cent of the cases I reviewed which were determined adversely to the interest of the recipient were in error. This error generally resulted from either a misinterpretation of Department policy or from bias toward the client by the Case Supervisor or other official.

4. These cases came to my attention in the following manner:

1) It was my policy to require Case Supervisors to forward to me all cases in which they received complaints from clients which they were not able to satisfy.

2) It was also my policy that all cases resulting in disturbances at intake be referred to me.

3) Letters and telephone calls were received from clients who insisted upon talking to me because their grievances were not settled by Case Supervisors, Unit Supervisors, or Case Workers.

4) Persons subordinate to the person making the decision to terminate assistance would confidentially request review. (e.g., Unit Supervisors and Case Workers, unhappy about a termination ordered by their Case Supervisors, would slip in and ask me to check a case.)

5) Community agencies, particularly schools, requested review because they were dissatisfied with appeals to Case Supervisors and their subordinates.

6) Inquiries came from the Central Office with regard to complaints they had received which they wished me to review personally. Such informal avenues of review were rarely provided by Senior Case Supervisors and Administrators, because it was not required by Department policy.

5. I discovered from my review and investigations that upon many occasions Case Supervisors supplanted the Case Worker and his Unit Supervisor to make an adverse client decision which resulted in suspending assistance or termination of the case. This often happened when a case was brought to a Case Supervisor since approval at that level was needed for a special grant (such as for furniture or clothing) or other decisions needed to be made. The Case Supervisor, upon reviewing the entire file, decided that the Case Worker has been "taken in" by the recipient. He instructed the worker or his Unit Supervisor to advise him the next time the client came into the office. At that time the Case Supervisor interviewed the client and terminated assistance. This he often did over the objections of the Case Worker.

6. The decision to terminate cases is made at all levels of the Department. For example, as set forth above, the Case Supervisor often determines to close a case even though such a course of action had not been recommended by the Case Worker or the Unit Supervisor. On many occasions, Case Workers or Unit Supervisors came to my office to ask that I reverse the decision of a Case Supervisor taken unilaterally. On other occasions I found out about such high level decisions only after receiving a letter of protest from the person whose aid was terminated.

7. Other decisions to terminate cases are made by Senior Case Supervisors, Center Administrators, Deputy Commissioners, the Commissioner himself, the Bureau of Public Assistance, the Legal Office, and the Office of Special Investigations. In many of these instances the Case Supervisor and Unit Supervisor and client do not know who had made the decision to terminate aid nor on what basis the decision was made, since the adverse decision made by

the Central Office is often transmitted to the Administrator or Senior Case Supervisor, who is instructed not to tell who made the decision. The client is given a legalistic reason for the decision which is often not the real basis for the decision made by the higher echelon. Many of these terminations are based on citizen complaints and anonymous letters which are not proven conclusively by investigation. In all of these instances the notice of termination goes out over the signature of the Unit Supervisor, even though neither he nor the Case Worker participated in the adverse decision.

8. Few difficult decisions to discontinue assistance were made without the Case Supervisor's participation and approval. Case Supervisor involvement in termination arose almost always in those cases in which there was a serious question of fact or more specifically a question of suspicion. That is, Case Supervisors did not get involved in termination decisions so often when termination was based upon proven employment, death, or the request of the recipient that aid be terminated. Rather Case Supervisors were consulted and participated in decisions to terminate when the issue was whether there was a man in the house, whether there were hidden resources, whether the family might not actually be living at the address, and so forth. Often this sort of termination resulted from confidential information from a hostile landlord or other source and had not been verified. Another common ground for termination in which Case Supervisors participated was "refusal to comply with departmental policies." This often meant that the mother would not give what the Department deems satisfactory information about the whereabouts of the father, even though she may in fact not have known the father's whereabouts. As I stated above, Case Supervisors often misinterpreted policies promulgated by the City and State.

9. Case Supervisors were also involved in cases whenever there was a request that there be an exception to policy. I became particularly familiar with this since requests for exceptions to policy were always referred to the Case Consultation Office which I directed for several years. No request for an exception to policy was made unless this request was first approved by a Case Supervisor, Senior Case Supervisor, or Administrator.

10. On the basis of my more than thirty years of experience in the New York City Department of Social Services, I am convinced that the new review procedures set forth in Procedural 68-18 are a sham, in that the very person responsible for an erroneous determination, often made on his own initiative, is the person afforded to the recipient for review.

In addition, this procedure states that a person in a higher echelon than the person who made the decision will be what is called the Review Officer. Since the client, the Case Worker, and his Unit Supervisor often do not know who made the decision, it is often impossible to determine whether the Review Officer is in fact of a higher echelon than the person who made the decision.

Clara Eisner

(Sworn to June 21, 1968.)

Affidavit of Neal I. Rosenthal in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

NEAL I. ROSENTHAL, being duly sworn, deposes and says:

1. I am a student at Columbia University School of Law. I am employed for the summer as a law clerk at the Columbia Center on Social Welfare Policy and Law.

2. I have examined decisions of fair hearings held to determine the propriety of the termination or suspension of welfare benefits. The schedules of these decisions, attached hereto, are submitted as Exhibit A.

3. My findings in regard to these schedules are as follows:

A. For the six cases for which information is available, the length of time between the date of request for hearing and the commencement of such hearing ranged from 20 days to 260 days, with an average of 118 days between request and commencement.

B. For the nine cases for which information is available, the length of time between the date of commencement of the hearing and the date of decision ranged from 65 to

195 days, with an average of 123 days between commencement and decision.

C. For the six cases for which information is available, the length of time between request and decision ranged from 163 days to 421 days, with an average of 256 days between request and decision.

4. The initial reasons given for the termination or suspension of benefits were as follows:

LEOLA MARTIN—Questions as to the residence of the father of one of recipient's children

RAYMOND CLERMONT—

RUTH HENRY—

ESTEBAN TORRES—Determination that workman's compensation award ($1500.00) should be considered a resource and utilized to meet family's current needs—instead of being placed in trust for children's later education.

TERESA BRIGGS-HALL—Determination that benefits of Veterans' Administration insurance policy should be used to satisfy needs of family and were not to be restricted in use to children's education as claimed.

ANGELA RODRIGUEZ—Suspended on ground that agency did not know facts regarding father's receipt of unemployment insurance benefits and was unable to obtain such due to failure of cooperation.

CORNELIA REESE COLEMAN—Failure to supply sufficient information to establish continuing eligibility.

Affidavit of Neal I. Rosenthal

EUNICE MCPHAIL—Had not paid rent although grant for rent was received.

ANDREW EAGAN—Failure to make self available for prescribed home visit.

Published Decisions:

B. Determination that appellant's mother should pay for items of general need rather than paying for automobile expenses.

C. Husband returned to home employed, with monthly net income ($20 per mo.) exceeding budgetary needs of family.

Neal I. Rosenthal

(Sworn to June 21, 1968.)

Exhibit A to Rosenthal's Affidavit

Schedule of Fair Hearing Decisions

(See Opposite ☞)

EXHIBIT A

SCHEDULES OF PRE-HEARING DECISIONS ON SUSPENSION OR TERMINATION CASES

	1 NAME	2 HEARING REQUESTED	3 HEARING COMPLETED	4 RESUMED*	5 RESUMED 30	6 DATE OF DECISION	7 NO. OF DAYS BETWEEN REQUEST AND COMPLETION	8	9 NO. OF DAYS BETWEEN COMPLETION AND DECISION	10	11 NO. OF DAYS BETWEEN REQUEST AND DECISION
1.	[illegible]		10/30/67			11/1/67			132		
2.	[illegible]		5/24/67								
3.	[illegible]		3/27/68								
4.											
5.											
6.	CLIFFORD THOMAS	5/2/67	6/14/67			10/24/67	43		132		225
7.											
8.	JOSEPH GREEN-HOLE	5/25/67	6/14/67			11/1/67	20		140		163
9.											
10.	[illegible]	3/2/66	10/17/66			5/23/67	219		161		421
11.	[illegible]	6/17/66	10/27/66			2/[illegible]/67	73		165		238
12.	[illegible]	3/2/66	6/5/66			8/17/66	[illegible]		65		167
13.	[illegible]	3/22/65	10/19/66			1/11/66	216		89		305

* Not indicated on available questionnaire

EXHIBIT A

SCHEDULES OF PUBLISHED RATE HEARING DECISIONS ON SUSPENSION OR TERMINATION CASES

	NAME	HEARING REQUESTED	HEARING COMMENCED	SUSPENDED	RESUMED	DATE OF DECISION	NUMBER OF DECISION	NO. OF DAYS BETWEEN HEARING AND COMMENCEMENT	NO. OF DAYS BETWEEN COMMENCEMENT AND DECISION
1	A (Rate Reduction)		10/30/67			2/1/68	2-68		124
2									
3	B		12/4/67			3/6/68	3-68		103
4									
5	C		1/9/68			3/26/68	4-68		67
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									
19									
20									
21									
22									
23									
24									

Affidavit of Harold Weinberger in Opposition to Defendants' Motions for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

HAROLD WEINBERGER, being duly sworn, deposes and says:

1. I am a student at the Columbia University School of Law. I am currently employed for the summer at Columbia Center on Social Welfare Policy and Law, 401 W. 117th Street, New York, New York 10027, as a law clerk.

2. I have examined numerous transcripts and decisions of fair hearings held in New York City, supplied by the City-Wide Coordinating Committee and other lawyers representing welfare clients in New York City.

3. Schedules of some 240 transcripts examined are attached as Exhibit A. Findings are based on those transcripts from which complete information could be gathered.

4. A sample of 106 cases supplied the necessary information to trace factual information from the date of the hearing request until the date of decision. The average number of days from the hearing request until the date of the hearing was 45.98 days. The average from the hearing

date until the decision date was 81.59 days. Thus, the average of the 106 cases which supplied sufficient information yielded 127.57 days from the hearing request until the date of decision.

5. A larger number of cases, specifically 157, including the 106 cases described above, supplied the necessary information for a sampling of dates from the date of hearing until the date of decision. The resulting figure was an average number of 79.18 days from the date of hearing until the date of decision.

6. 25 of the 240 cases examined were closed without decision or withdrawal. Furthermore, several cases have been heard, yet decisions have been pending for a great amount of time, as can be determined from the schedules comprising Exhibit A.

7. A schedule was also compiled of cases for which decisions were made in March of 1968, and which were published by the New York State Department of Social Services. Utilizing March 15, 1968 as the average date of decision, as the actual date in March is not included in the published decisions, the average time lapse between the hearing date and the date of decision is 111.2 days. Exhibit B records these decisions.

Harold Weinberger

(Sworn to June 21, 1968.)

Exhibit A to Weinberger Affidavit

Schedule of Fair Hearing Decisions

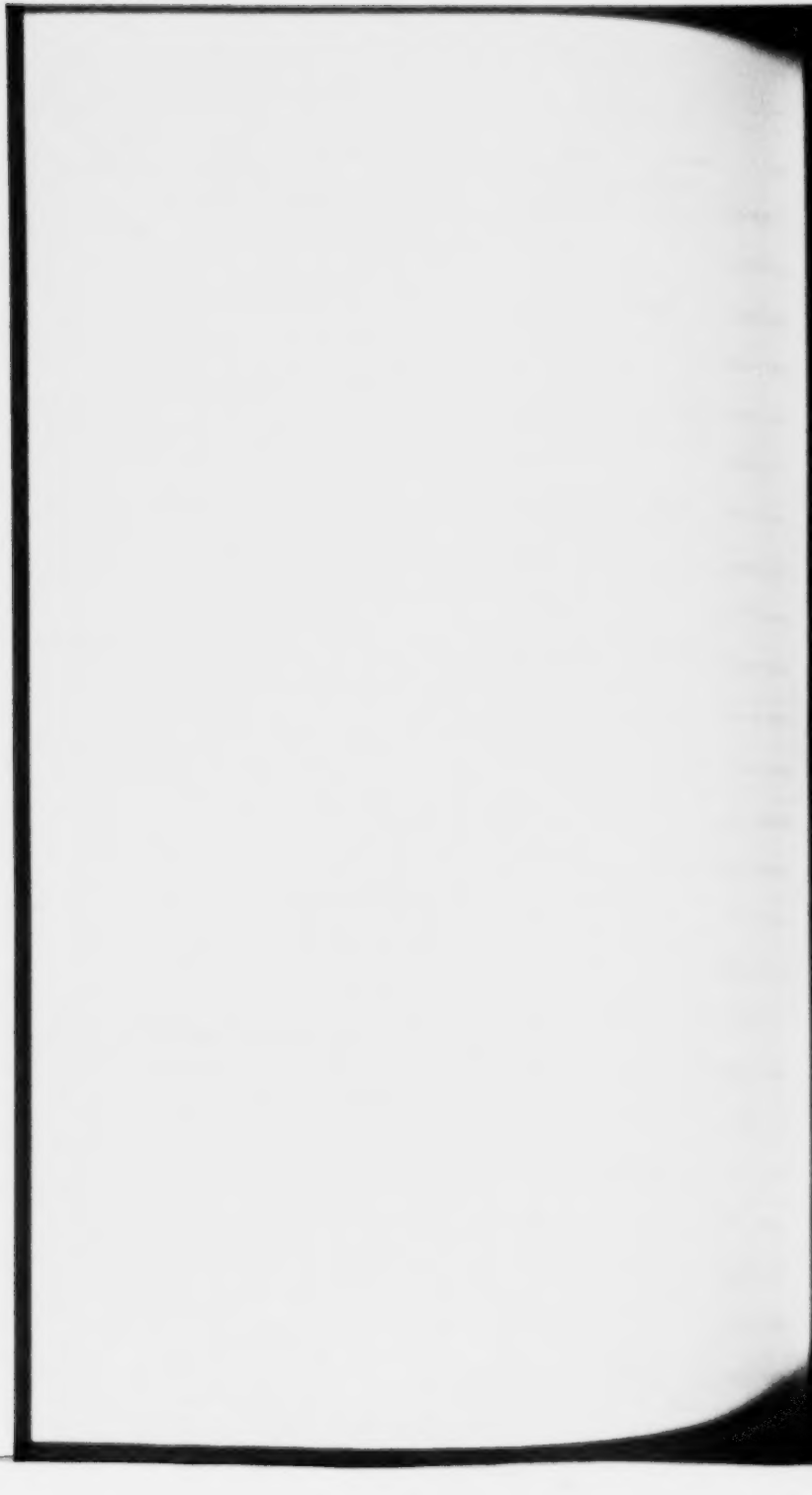
(See Opposite ☞)

EXHIBIT A

1	2	3	4	5	6	7
NAME	HEARING REQUESTED	HEARING CONDUCTED	DOCUMENTED	RETURNED	DATE OF REVISION	TRANSCRIPT RECEIVED
[illegible]	10/30/67	11/28/67 9:00 AM			2/7/68	4/4/68
[illegible]	2/16/67	9/22/67 10:15 A.M.			11/21/67	
[illegible]		10/31/67			11/29/67	
[illegible]	1/29/68	3/1/68 10:15 AM			5/29/68	
[illegible]	9/1/67	10/19/67			1/15/67	
[illegible]		9/28/67 10 A.M.			11/29/67	
[illegible]		10/13/67			1/15/68	
[illegible]	7/25/67	9/29/67 10 AM			11/17/67	
[illegible]		11/24/67				
[illegible]	9/27/67	9/27/67 9:00 AM			11/21/67	
[illegible]		10/16/67			11/15/67	
[illegible]		10/10/67 9:00 AM			11/20/67	
[illegible]	10/30/67	11/29/67 9:00 AM			2/23/68	4/4/68
[illegible]	10/15/67	3/27/68 6:30 PM			5/8/68	
[illegible]		11/2/67				
[illegible]		9/20/67				
[illegible]		10/16/67			—	
[illegible]	8/16/67	9/29/67 9:00 AM			11/22/67	
[illegible]	8/17/67	10/6/67 1:30 PM			12/14/67	
[illegible]	8/22/67	9/28/67 9:00 AM			12/5/67	
[illegible]		10/13/67 10 AM			11/14/67	
[illegible]	10/7/67	11/13/67 9:30 AM			1/1/68	
[illegible]		10/27/67		11/9/67		
[illegible]	3/15/67	10/5/67 10:00 AM			11/20/67	

	2	3	4	5	6	7
	HEARING REQUESTED	HEARING COMMENCED	PRODUCED	RESUMED	DATE OF DECISION	TRANSCRIPT RECEIVED
		10/19/67 9:30 AM			12/29/67	
		11/20/67 9:30 AM			—	
		2/9/68			PENDING	
	10/30/67	11/20/67 10 AM	11/20/67 GY. EXH	12/21/67	—	
		9/28/67 9:00 AM	9/28/67 Y'EXH		—	
	8/2/67	9/22/67 12 noon			11/21/67	
	9/28/67	11/1/67 10 AM			12/28/67	
		10/20/67				
		10/19/67			11/29/67	
	6/20/67	12/19/67			9/22/68	
	9/11/67	11/10/67 10:30 AM			7/25/68	
		9/26/67 2 pm			11/29/67	
	10/30/67	11/13/68 1 PM			5/17/68	
	10/30/67	12/19/67 10:30 AM			3/11/68	
	8/16/67	9/19/67 4 pm			11/12/67	
	9/28/67	11/30/68			4/4/68	
	9/21/67	10/17/67 11:00 AM			11/22/67	
	8/16/67	9/18/67 11:15			11/29/67	
		12/26/67		11/29/68	3/12/68	
	8/16/67	9/18/67 2:30 PM			11/20/67	
	10/19/67	11/8/67			4/5/68	
		10/17/67			11/2/68	
		11/2/67				
		11/8/67				

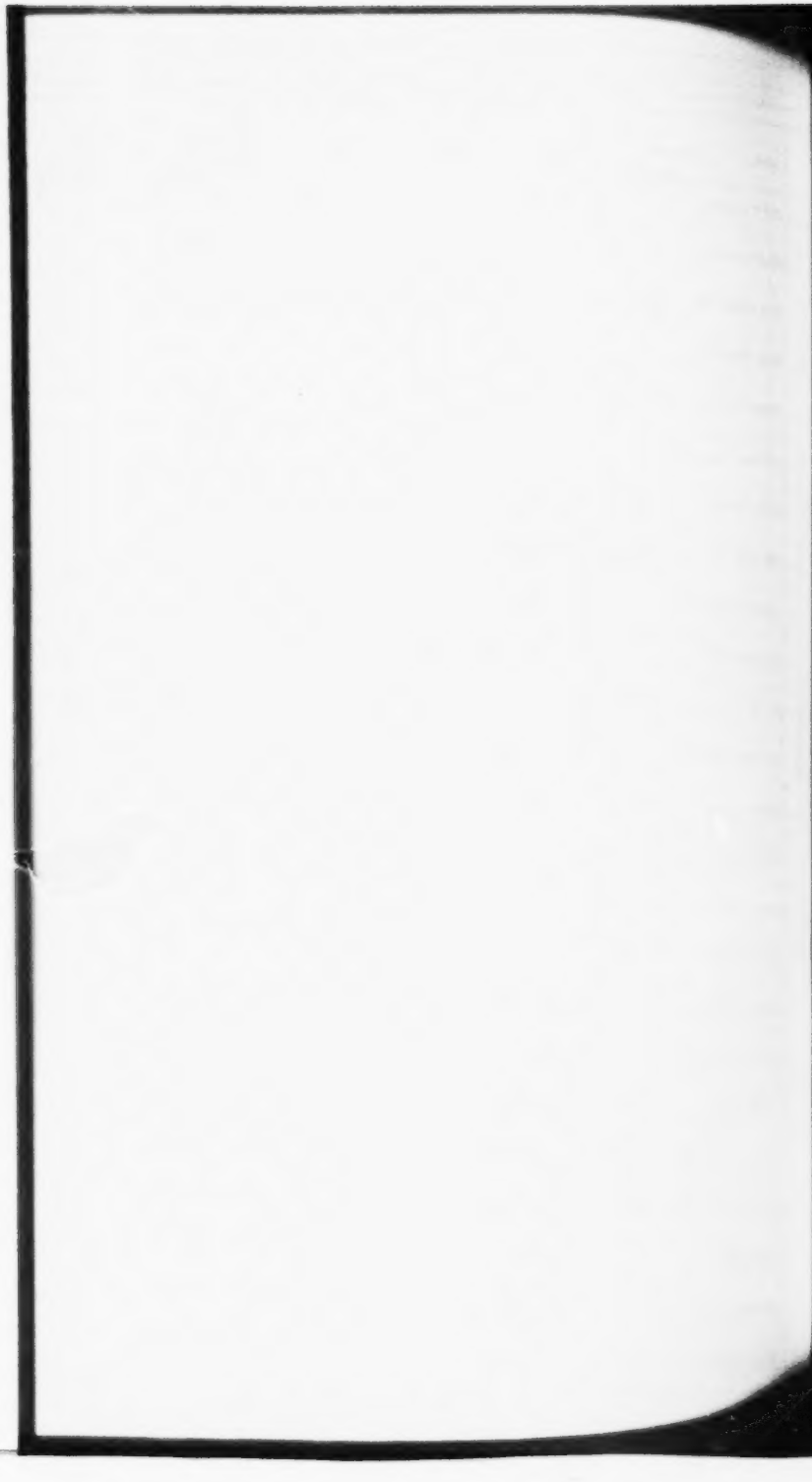
	1	2	3	4	5	6	7
	CASE	HEARING REQUESTED	HEARING COMPLETED	ADJOURNED	RESUMED	DATE OF DECISION	TERMINABILITY REPORTED
1.	[illegible]		10/5/67				
2.	[illegible]		10/10/67			3/28/68	
3.	[illegible]						
4.	[illegible]		11/22/67				
5.	[illegible]						
6.	[illegible]	7/29/67	10/24/67 10:00 AM			11/2/67	
7.	[illegible]		10/22/67				
8.	[illegible]						
9.	[illegible]	10/30/67	12/4/67 11 AM			2/27/68	
10.	[illegible]		12/4/67				
11.	[illegible]						
12.	[illegible]		10/17/67 10:00 AM			12/21/67	
13.	[illegible]		10/25/67			—	
14.	[illegible]		11/1/67				
15.	[illegible]						
16.	[illegible]		10/23/67 9:30 AM			3/15/68	
17.	[illegible]		10/13/67 11:00 AM	[illegible]		DISMISSED	
18.	[illegible]						
19.	[illegible]	9/5/67	10/4/67 9 AM		11/8/67 9:00 AM	1/10/68	
20.	[illegible]						
21.	[illegible]		11/30/67				
22.	[illegible]						
23.	[illegible]	10/30/67	11/28/67 8:00 AM			1/29/68	4/4/68
24.	[illegible]						
25.	[illegible]	1/7/68	3/1/68	3/1/68 adj. for briefs	2/21/68	6/4/68	
26.	[illegible]		10/3/67			9/29/67	
27.	[illegible]						
28.	[illegible]	10/30/67	12/1/67			5/2/68	
29.	[illegible]						
30.	[illegible]	1/29/68	2/21/68 11:30 AM			5/24/68	
31.	[illegible]						
32.	[illegible]		11/30/67				
33.	[illegible]						
34.	[illegible]		11/20/67			12/24/67	
35.	[illegible]						
36.	[illegible]	10/30/67	11/20/67 9:30 AM			4/11/68	
37.	[illegible]		9/27/67			11/20/67	
38.	[illegible]						
39.	[illegible]	12/15/67	2/7/68			4/11/68	



1	2	3	4	5	6	7
NAME	HEARING REQUESTED	HEARING CONDUCTED	ADJOURNED	RESUMED	DATE OF DECISION	TRANSCRIPT RECEIVED
[illegible]	12/20/67	12/28/67			3/22/68	
[illegible]	9/6/67	9/20/67			11/14/67	
[illegible]	10/30/67	11/20/67			6/5/68	
[illegible]	8/15/67	9/27/67			12/7/67	
[illegible]		3/22/67				
[illegible]		8/3/67				
[illegible]	10/20/67	11/14/67			12/20/67	
[illegible]	8/15/67	9/27/67	9/[illegible]/67		—	
[illegible]		9/12/67			11/20/67	
[illegible]		9/13/67				
[illegible]		11/28/67			1/20/68	
[illegible]		11/1/67	Adj.		—	
[illegible]	8/4/67	9/20/67	9/[illegible]/67		—	
[illegible]		9/20/67			11/28/67	
[illegible]		10/4/67			12/15/67	
[illegible]	8/14/67	9/12/67			12/22/67	
[illegible]	8/17/67	9/19/67			12/1/67	
[illegible]		12/1/67				
[illegible]	12/8/67	12/20/67			3/27/68	
[illegible]		10/11/67			12/27/67	
[illegible]	10/30/67	11/22/67			3/13/68	3/[illegible]/68
[illegible]	9/22/67	10/[illegible]/67	10/[illegible]/67	2/20/68	3/[illegible]/68	
[illegible]	12/30/67	12/[illegible]/67			3/4/68	
[illegible]	10/30/67	11/22/67			3/12/68	

1	2	3	4	5	6	7
APP	HEARING REQUESTED	HEARING COMPLETED	REMANDED	RESUMED	DATE OF DECISION	TRANSCRIPT ORDERED
[illegible]		9/21/67				
[illegible]	9/1/67	10/30/67			1/29/68	
[illegible]		10/3/67			11/29/67	
[illegible]		11/29/67				
[illegible]	8/30/67	11/21/67			2/15/68	
[illegible]	9/16/67	9/25/67			—	
[illegible]		9/27/67			11/14/67	
[illegible]	7/12/67	10/27/67			PENDING	
[illegible]		11/2/67			1/19/68	
[illegible]	10/30/67	11/22/67			3/27/68	
[illegible]		10/18/67			—	
[illegible]	8/4/67	9/21/67			11/21/67	
[illegible]	8/1/67	9/25/67			12/7/67	
[illegible]		11/14/67				
[illegible]						
[illegible]	10/30/67	11/24/67			12/12/68	9/22/68
[illegible]		10/31/67				
[illegible]		11/21/67			4/16/68	
[illegible]	8/16/67	10/30/67	10/30/67	11/20/67	1/22/68	
[illegible]		9/22/67				
[illegible]	9/18/67	9/20/67			11/22/67	
[illegible]	10/17/67	12/20/67			4/19/68	
[illegible]	9/13/67	9/21/67			12/27/67	
[illegible]	3/[illegible]/68	4/1/68			5/24/68	

1	2	3	4	5	6	7
NAME	HEARING REQUESTED	HEARING COMMENCED	ADJOURNED	RECEIVED	DATE OF DECISION	DATE MAILED
1. [illegible]		10/20/67		12/8/67	1/29/68	2/5/68
2. [illegible]	9/4/67	10/6/67			12/4/67	
3. [illegible]	7/15/67	9/22/67			12/4/67	
4. [illegible]		9/21/67				
5. [illegible]	9/22/67	10/2/67	ADJ.		—	
6. [illegible]		10/11/67				
7. [illegible]		10/18/67			—	
8. [illegible]	10/13/67	11/14/67		12/20/67	2/22/68	
9. [illegible]		9/21/67				
10. [illegible]		10/12/67	ADJ.		—	
11. [illegible]	10/27/67	10/27/67			2/26/68	
12. [illegible]		10/30/67			2/14/68	
13. [illegible]	9/8/67	10/6/67			12/4/67	
14. [illegible]	11/9/67	11/9/67			2/5/68	
15. [illegible]	9/16/67	9/21/67			11/21/67	
16. [illegible]	9/21/67	10/20/67			1/24/68	
17. [illegible]		10/25/67	ADJ.		—	
18. [illegible]		9/26/67			12/5/67	
19. [illegible]	8/10/67	10/1/67			11/20/67	
20. [illegible]	8/16/67	10/10/67			11/24/67	
21. [illegible]	8/16/67	10/2/67			11/20/67	
22. [illegible]		10/6/67				
23. [illegible]		10/31/67	Ref. by ALJ for [illegible]		—	
24. [illegible]	9/20/67	10/18/67			1/15/68	



	1	2	3	4	5	6	7
	NAME	HEARING REQUESTED	HEARING COMMENCED	ADJOURNED	RESUMED	DATE OF DECISION	TRANSCRIPT ARRIVAL
1.	[illegible]	8/14/67	8/25/67 3:00 pm			11/29/67	
2.	[illegible]	8/15/67	8/24/67 2:40 PM			12/12/67	
3.	[illegible]	3/11/67	3/20/67 3:30 PM			4/22/68	
4.	[illegible]	9/15/67	10/4/67 9:20 AM			11/30/67	
5.	[illegible]		10/12/67 9:30 AM			2/5/68	
6.	[illegible]		9/22/67				
7.	[illegible]	9/13/67	9/21/67			4/17/67	
8.	[illegible]		10/12/67 10:00 AM	10/19/67 by agreement of [illegible]		3/13/67	
9.	[illegible]		11/15/67				
10.	[illegible]	8/4/67	10/31/67			2/27/68	
11.	[illegible]		9/27/67			12/4/67	
12.	[illegible]		11/13/67				
13.	[illegible]		11/20/67			1/16/68	
14.	[illegible]		10/18/67	10/20/67 [illegible]	11/9/67 [illegible]	—	
15.	[illegible]	8/16/67	9/25/67 2:00 pm	9/25/67 [illegible]		—	
16.	[illegible]	10/26/67	11/29/67	[illegible]		12/21/67	
17.	[illegible]		9/29/67				
18.	[illegible]		10/12/67		11/13/67	—	
19.	[illegible]		10/23/67			—	
20.	[illegible]		10/25/67 2:45 PM	ADJ.		—	
21.	[illegible]		10/18/67			1/31/68	
22.	[illegible]		9/29/67			11/24/67	
23.	[illegible]		9/28/67			12/19/67	
24.	[illegible]		9/29/67 1:30 PM	9/29/67 [illegible]		—	

1	2	3	4	5	6	7
NAME	HEARING REQUESTED	HEARING COMMENCED	POSTPONED	RESUMED	DATE OF DECISION	TRANSCRIPT RECEIVED
[illegible]		10/18/67			—	
[illegible]	9/8/67	10/23/67	ADJ.		—	
[illegible]		11/21/67 9 AM	11/21/67 POSTPONED REQUESTED COUNSEL FOR RESPONDENT		—	
[illegible]		10/23/67				
[illegible]		11/21/67 1:30 PM	11/21/67 POSTPONED SETT. MAY PREPARED		—	
[illegible]		10/24/67			3/29/68	
[illegible]		11/24/67 9:00 AM	11/24/67 PCHS RESPONDENT WITHDRAWN		—	
[illegible]	8/15/67	11/24/67 2:00 PM			12/22/67	
[illegible]	8/16/67	9/27/67 11:30 AM				
[illegible]		9/27/67 10:00 AM	9/27/67 POST. PER JOINT REQUEST SETT. MAY BE PREPARED		—	
[illegible]		11/24/67			—	
[illegible]		11/27/67				
[illegible]		11/24/67			—	
[illegible]	10/30/67	12/7/67 10:30 AM			11/14/68	7/9/68
[illegible]	7/24/67	11/9/67			1/12/68	
[illegible]		11/21/67			1/30/68	
[illegible]	8/16/67	9/29/67 12:30 PM			11/22/67	
[illegible]	7/20/67	11/2/67			4/10/68	
[illegible]		9/22/67			12/4/67	
[illegible]		4/3/67 10:30 AM			4/9/68	
[illegible]	9/10/67	10/26/67 2:30 PM	ADJ.		—	
[illegible]	9/5/67	9/29/67 10:00 AM			12/6/67	
[illegible]		10/31/67 9 AM	10/31/67 POST. BY JOINT REQUEST		—	

	1	2	3	4	5	6	7
	NAME	HEARING REQUESTED	HEARING CONVENED	ADJOURNED	RESUMED	DATE OF DECISION	TRANSCRIPT RECEIVED
1	[illegible]	1/5/68	1/24/68			6/4/68	
2							
3	[illegible]	9/11/67	10/17/67 1:30 PM			1/2/68	
4							
5	[illegible]	9/13/67	9/29/67 2:30 PM			2/14/68	
6							
7	[illegible]	9/26/67	10/31/67		12/20/67	2/28/68	
8							
9	[illegible]	9/14/67	9/29/67 2:30 PM			11/24/67	
10							
11	[illegible]	9/16/67	9/21/67 9:30 AM			9/27/67	
12							
13	[illegible]		10/4/67		11/2/67		
14							
15	[illegible]		11/8/67				
16							
17	[illegible]	8/21/67	9/29/67 1:00	9/27/67	Resolved by agreement	11/24/67	
18							
19	[illegible]		2/20/67 11:30 AM			4/12/68	
20	[illegible]		10/31/67			2/29/68	
21							
22	[illegible]	11/22/67	2/13/68			4/17/68	
23							
24	[illegible]		10/3/67			10/20/67	
25							
26	[illegible]		10/9/67	Adj. Sine die pending [illegible] 11/30/67	11/2/67 Withdrawn [illegible]	—	
27							
28	[illegible]		10/2/67 12:30 PM			12/14/67	
29							
30	[illegible]		10/2/67			11/20/67	
31							
32	[illegible]		10/30/67 10:05 AM			11/29/67	
33	[illegible]	2/17/67	9/19/67 11:30 AM			11/29/67	
34							
35	[illegible]	8/16/67	9/25/67 3:00 PM			11/21/67	
36							
37	[illegible]	8/16/67	10/9/67 2:00 PM			11/29/67	
38							
39	[illegible]	9/20/67	11/28/67 2:30 PM			2/27/68	
40							
41	[illegible]	7/27/67	10/17/67			2/15/68	
42							
43	[illegible]	9/14/67	10/9/67	10/9/67 at request of [illegible]	11/6/67	2/6/68	
44							

EXHIBIT B

PUBLISHED DECISIONS

1	2	3	4	5	6	7
CASE	HEARING REQUESTED	HEARING COMMENCED	ADJOURNED	RESUMED	DATE OF DECISION	NO. OF DECISION
A		1/4/68			3/68	1-68
B		9/25/67			3/68	4-68
C		3/6/68			3/68	5-68
D		11/14/67			3/68	7-68
E		9/28/67			3/68	10-68

Affidavit of Beaulah E. Sanders in Opposition to Defendants' Motions for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

I, BEAULAH E. SANDERS, being duly sworn, depose and say:

1. I am 32 years old. I reside at 74 W. 92nd St., New York, New York.

2. I am Chairman of the Citywide Coordinating Committee of Welfare Groups, and Second Vice Chairman of the National Welfare Rights Organization. In both official capacities, I am responsible for receiving information from, and disseminating information to, groups of public assistance recipients, especially those in New York City where the Citywide Coordinating Committee of Welfare Groups is headquartered at 514 W. 126th St., New York, N.Y.

3. Since the fall of 1967, when the Citywide Coordinating Committee of Welfare Groups initiated a mass Fair Hearing campaign on behalf of numerous public assistance recipients seeking clothing and household furnishings, numerous Welfare Group leaders and members have told me that many public assistance recipients were being threat-

ened with loss or suspension of assistance, if they persisted in seeking fair hearings, or participating actively with their Welfare Groups.

4. For example, I was informed by Mrs. Ruth Pressley, chairman of a Welfare Group known as Welfare Recipients in Action, 148 W. 118th St., New York, N.Y., that she herself had been threatened with suspension last year by her caseworker because of her activities. Mrs. Pressley, in turn informed me of the threatened suspension of Rosetta Carter by the then Non-Residence Center of the New York City Department of Social Services, and the threatened denial of assistance to Miss Vernon Roberts, by the Harlem Center of the New York B.E.S. City Department of Social Services, because of their activities on behalf of the welfare rights movement in New York.

5. In the winter of 1967-68, I called the threatened suspensions and terminations to the attention of a person known to me as Joseph Louchheim, Deputy Commissioner of the State Department of Social Services of New York. Mr. Louchheim suggested that a list of such threatened suspensions or terminations be compiled by the Citywide Coordinating Committee of Welfare Groups and given to him for further action. Such a list is being compiled at this time.

Beaulah E. Sanders

(Sworn to June 21, 1968.)

Affidavit of Allen R. Viani in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

ALLEN R. VIANI, being sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services from November 1, 1966 date until present date. I was also the President of Local 371, American Federation of State, County and Municipal Employees, from December 1, 1964 until July 1, 1967. Local 371 represents supervisory personnel of the City Department of Social Services, including senior case supervisors, case supervisors, and unit supervisors at welfare centers throughout the City.

2. I am currently the grievance chairman for Local 371 and as such am responsible for processing grievances of the membership, answering inquiries regarding department policies, informing the members of such policies. I am also a member of the Executive Committee of Local 371 and as such participate in negotiations between the Union and the City Department of Social Services.

3. There were negotiations between the City and the Union in regard to the review procedures set out in State Regulation 351.26, NYCRR and in New York City transmittals regarding this regulation. As originally contemplated in

351.26 promulgated on February 15, 1968, the review officer was to be a specially designated case supervisor for each welfare center, with no other responsibility for the direction of the case unit and no previous relationship with the particular cases to be reviewed. This person's primary responsibility was to undertake review of case closings in a hearing which the recipient would attend. However, the City declined to implement this procedure, on the announced ground to the Union that it would interfere with the Federal Social Security Act which guarantees a fair hearing conducted by the State.

4. Section 351.26, as now implemented in procedure 68-18, dated May 21, 1968, was the subject of subsequent negotiations between the Union and the City, affecting, as it does, the responsibility and tasks of case supervisors. The review officer under this procedure is the case supervisor in a case unit comprised of caseworkers, unit supervisors, and the case supervisor. The case supervisor in such a unit is responsible for supervising the operation of the unit, including approval and review of cases within the unit. Case supervisors advise and direct the operations of the unit supervisors and caseworkers; approve certain decisions of the unit supervisor; consult with the unit supervisor on special grants and case closings; and evaluate the performance of the unit supervisors and caseworkers.

5. The duties and functions of the case supervisors were not changed in any respect as a result of Procedure 68-18 except for the additional function of acting as a review officer.

6. Procedural 68-18 requires that the review be undertaken by an employee who occupies a position superior to that of the employee who approved the proposed discon-

tinuance or suspension of assistance. Since case supervisors were very often the person who approved a closing, formally or informally through consultation with the unit supervisor or caseworker, question was raised whether the case supervisor was qualified to undertake the review. The Department issued instructions that the unit supervisor sign the notice of propsed termination or suspension and that the case supervisor thereafter undertake the review. The approval set out in Procedure 68-18 was said to be the formal approval entered in the case record—and reflected on the notice of proposed discontinuance.

7. Since Procedure 68-18 was announced to the case supervisors, I have received a number of inquiries and complaints from case supervisors in regard to this procedure. I have received and dealt with these complaints as grievance chairman of Local 371. I was informed that Procedure No. 68-18 was objectionable to case supervisors on the ground that it entailed an additional workload without adequate time or allowance being made for it and that case supervisors did not feel qualified to be a review officer on the decision to suspend or terminate. Case supervisors informed me that they frequently participated in the decision to close a case and therefore were familiar with the matter of closing. The review required in Procedure No. 68-18 was therefore a review of a decision in which they had participated prior to the review itself. Said review of the decision to close had been and would continue to be undertaken in the regular chain of command as a result of their duties as case supervisors. These persons therefore could not understand how they could be called review officers.

Alan R. Viani

(Sworn to June 18, 1968.)

Affidavit of Donald H. Fields in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

DONALD H. FIELDS, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services since 11/67, and work at the Borough Hall Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty (20) caseworkers, with an average of 1,200 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially, on either an informal or formal bases for guidance. Often as a product of reviewing and reading case records and consulting with su-

periors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18, and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information, except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as a review officer. I received no special training or instruction, nor were any study materials provided.

Donald H. Fields

(Sworn to June 18, 1968.)

Affidavit of Blanche Greif in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

BLANCHE GREIF, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services since 12/66, and work at the Nevins Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty (20) caseworkers, with an average of 1,200 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially on either an informal or formal basis for guidance. Often as a product of reviewing and reading case records and consulting with su-

periors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18, and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as review officer. I received no special training or instruction, nor were any study materials provided.

Blanche Greif

(Sworn to June 18, 1968.)

Affidavit of Murray J. Hirsh in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MURRAY J. HIRSH, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services since 8/63, and work at the Bayridge Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty (20) caseworkers, with an average of 1,200 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially, on either an informal or formal basis for guidance. Often as a product of reviewing and reading case records and consulting with su-

periors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18 and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information, except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as a review officer. I received no special training or instruction, nor were any study materials provided.

Murray J. Hirsh

(Sworn to June 18, 1968.)

Affidavit of Abraham Kaufman in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

ABRAHAM KAUFMAN, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services since 12/63, and work at the Queens Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty (20) caseworkers, with an average of 900 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially, on either an informal or formal basis for guidance. Often as a product of re-

viewing and reading case records and consulting with superiors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18, and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information, except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as a review officer. I received no special training or instruction, nor were any study materials provided.

Abraham Kaufman

(Sworn to June 18, 1968.)

Affidavit of James McKeon in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JAMES MCKEON, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services since November '66 and work at the Fordham Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty (20) caseworkers, with an average of 1200 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially, on either an informal or formal basis for guidance. Often as a product

of reviewing and reading case records and consulting with superiors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18, and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information, except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as a review officer. I received no special training or instruction, nor were any study materials provided.

James McKeon

(Sworn to June 18, 1968.)

Affidavit of Ann W. Rosenhaft in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

ANN W. ROSENHAFT, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Socia Services since 12/31/66 and work at the Borough Hall Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty caseworkers, with an average of 400 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially, on either an

informal or formal basis for guidance. Often as a product of reviewing and reading case records and consulting with superiors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18, and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information, except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as a review officer. I received no special training or instruction, nor were any study materials provided.

Ann W. Rosenhaft

(Sworn to June 18, 1968.)

Affidavit of Francis M. Weldon in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

FRANCIS M. WELDON, being duly sworn, deposes and says:

1. I have been a case supervisor with the New York City Department of Social Services since 11/66, and work at the Clinton Welfare Center.

2. As a case supervisor I am responsible for a case unit comprised of four (4) unit supervisors and twenty (20) caseworkers, with an average of 1,200 cases.

3. It is my responsibility to supervise and coordinate the work of a number of case units in the Welfare Center. These duties include discussions and interpretations with the staff of welfare policies and procedures; the analysis of reports on cases to be reviewed, re-certified and referred for consultant or specialist services. My duties also involve the reading of case records, in order to aid the caseworkers and Unit Supervisor in determining how to handle particular case problems. The very nature of these activities creates a close working relationship with the employees in the unit. When a case is considered for termination, I am often consulted initially, on either an informal or formal basis for guidance. Often as a product of re-

viewing and reading case records and consulting with superiors, I will initiate a recommendation that a particular case be closed.

4. I have been informed of the New York review procedure for closings, set out in New York Procedure No. 68-18, and that I am responsible for review of cases in my unit which are closed.

5. I am familiar with many of the cases to be closed in my unit even before a Notice of Termination is sent out through consultation with my staff. Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close. I may, under this procedure, consult with the caseworker or unit supervisor involved in the closing and obtain information from such persons. I do not under this procedure have any access to the recipient for information, except that written information submitted by the recipient in objection to the closing.

6. My duties and functions were not altered or modified as a result of Procedural 68-18, except for the added responsibility of acting as a review officer. I received no special training or instruction, nor were any study materials provided.

Francis M. Weldon

(Sworn to June 18, 1968.)

Affidavit of David Gilman in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

DAVID GILMAN, being duly sworn, deposes and says:

1. That I reside at 160 West 96th Street, New York, New York.

2. That I am an attorney admitted to practice in the State of New York, First Judicial Department.

3. Since November 1965, I have been employed as a litigation attorney, for the Legal Aid Society and The Center on Social Welfare Policy and Law at Columbia University. Currently I am employed by the Legal Unit of Mobilization For Youth, Inc., 759 Tenth Avenue, New York, New York.

4. That as an attorney for these organizations I have extensive experience in representation of Welfare recipients, both on an administrative hearing level and in State and Federal Courts. During the last two-and-one-half years I have represented more than one hundred Welfare recipients in the City of New York.

5. Many recipients who I have represented had their assistance terminated. Ninety-nine percent of the recipients who come to me with a termination case are returned to the welfare rolls after it is demonstrated that the ter-

mination was illegal. This result is accomplished by one of two procedures: (a) informal negotiations with the Welfare Department; (b) formal appeal to the State Department for an administrative hearing.

6. Informal negotiations consists of contacting the local welfare center and discussing the facts of the case with the case supervisor or an assistant to the director. Often the case supervisor takes the matter over entirely and is dealt with exclusively. This process often includes informal conferences, between the Department, the lawyer and the recipient. It has been my experience that case supervisors are consulted and initially approve most decisions to close. Many times I have been told by caseworkers and unit supervisors that a particular case was terminated upon orders of the case supervisor responsible for the unit.

7. During the last two-and-one-half years I have participated in at least one hundred hearings before the State Department of Social Services. A high percentage involved suspensions or terminations of assistance. I have never lost a case at an administrative hearing where the issue was suspension or termination of assistance. The number of termination cases that actually proceed through the hearing process are relatively few, since the Department usually offers to negotiate and settle the case, often in the hearing room itself. As of this date, I have never lost a termination case that has gone through the hearing process.

8. In almost all termination cases I have handled, the issues involved questions of fact often under vague regulations and the veracity of witnesses. In my experience there is seldom an issue that can be resolved solely through the submission of documents. The issues involve questions of fact and interpretation of regulations.

Affidavit of David Gilman

9. During the last two-and-one-half years, I have not participated in one hearing in which the State has conformed to the time limitations established by its own regulations. The average time from initial request to the receipt of a hearing decision is from four to five months. Hearings are scheduled for a particular hour, and referees will adjourn a hearing arbitrarily without regard to the client's need for a speedy decision. When a hearing is adjourned, it is usually not rescheduled for at least six weeks. Cases that are scheduled for eleven o'clock in the morning will not be allowed to run into the afternoon, and will be adjourned not to a day certain, but to a date solely in the discretion of the State. Cases are adjourned at five o'clock regardless of the issue, even though they were scheduled initially for a four o'clock hearing. Referees will allow any type of hearsay evidence to be presented by Department personnel in support of their position. Documents relied upon by the Department are not made available to the client's attorney nor are they subject to inspection at the hearing.

10. The referees themselves often express an outright bias towards recipient's claims and it is not unusual for referees to confer with Department personnel privately about the facts in a particular case. The ability to win a particular case will depend more upon the personality of the referee and his "feelings" concerning the issue than the objective analysis of the evidence presented.

11. Of course, the informal negotiation described above which is so often successful generally requires the assistance of counsel or a representative from a welfare rights organization. These resources are available to only a small minority of those persons whose aid is discontinued.

David Gilman

(Sworn to June 22, 1968.)

Affidavit of Richard Greenberg in Opposition to Defendants' Motions for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

RICHARD GREENBERG, being duly sworn, deposes and says:

1. I am a third-year law student at the New York University School of Law.

2. I am presently employed by the United Welfare League, at 929 Columbus Avenue, New York 10025.

3. In the course of this employment I have represented over 1,000 welfare clients before the New York City Department of Social Services. During the past year I have represented approximately 200 welfare clients during some stage of the fair hearing process. These cases have included approximately 10 terminations of which 5 have been under the new prior review procedure of Section 351.26, Title 18 of New York Code of Rule and Regulations.

4. Termination cases are, in my experience, always approved at least on the case superior level, although the termination papers are signed by unit supervisors.

Affidavit of Richard Greenberg

5. In the majority of termination cases in which there is a dispute, that is, those cases in which the recipient objects to the termination of assistance, termination has been approved by all local levels of administration including the administrator of the center. In at least some cases, the termination decision originates at the case supervisory level over unit supervisory or case worker opposition.

6. While fair hearings are usually scheduled within the statutory 33 day period, decisions are rarely if ever reached within the required time limits. Further delays in reaching decisions are caused by the State's liberal adjournment policy. Non-appearance of the City agency or some part of the City agency personnel, as well as of case record, the arrival of noon or 5 p.m., and the failure of the appellant to produce a witness whom the referee considers essential to appellant's case, even though the appellant is willing to proceed without him, have all been grounds at one time or another for the referee to adjourn over the objections of the appellant.

7. Hearings once adjourned can take from two weeks to two months or more for rescheduling. Some adjourned hearings have been rescheduled as late as three months after adjournment, despite repeated requests for rescheduling. The State has delayed up to six months in rendering decisions in fair hearings, even though the 30- and 12-day limits were long exhausted. Termination cases are handled somewhat more promptly though never, to my knowledge, within the 12-day limit. In this respect, it is interesting that the New York City Department of Social Services has seen fit to adhere rigorously to a 7-day calendar time limit for replying to proposed suspensions.

8. Some terminated cases have been reinstated by the City either during or after a hearing but before the render-

ing of a decision by the State. However, this reopening when it occurs is generally after one or more missed checks. This creates a great hardship on the clients, since these checks are recovered with only the greatest difficulty and in some cases are never recovered. This continues under the new procedure. Indeed, in some cases checks are withheld before the case is officially terminated, thus rendering even the prior review procedure of no value.

9. Usually a disputed termination arises out of vague suspicions of misdoings on the part of the client, or agency irritation with the attitude of the recipient, a dispute in the interpretation of policy rules and regulations, or because of a misunderstanding of fact. The following description of some recent termination cases may be useful examples:

1) Legal responsibility of stepparent challenged. Case reinstated on technicality. Agency indicated its intent to terminate again.

2) Suspected drug addiction. The agency based its finding on 15-minute interview with social worker. Still suspended, awaiting hearing, after negative review conducted by *Unit* supervisor who had made initial decision in case.

3) Agency mistakenly held Social Security benefits of children as income to mother. Reinstated before hearing, decision on retroactive benefits rendered six months after hearing, 9 months after the case closing. Retroactive payments not yet fully made almost 12 months after closing of case.

4) Case suspended after client hung up on case supervisor when client felt herself insulted by remarks of supervisor who was investigating "misuse" of

funds. Case reopened before fair hearing after my extensive intervention.

5) Agency suspended case because "on March 8, 1968, you requested a loan of $480 and was granted (*sic*) the loan for furniture and you also have an account at Gimbels Department Store." Awaiting review at the center level by Case Supervisor who made initial decision, but checks are being withheld.

10. In summation, the "prior review" now afforded by the New York City Department of Social Services does not protect the rights of recipients. In part this is because the agency is careless in providing notification of the intended termination, in part because review is made by those who originally participated in the decision to terminate. It should be noted in the latter respect that two administrators of centers within the New York City Department of Social Services have stated to me in recent conversations that no review within the center could avoid this pitfall since all termination cases are reviewed by all supervisory levels including themselves.

Richard Greenberg

(Sworn to June 21, 1968.)

Affidavit of Cesar A. Perales in Opposition to Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

CESAR A. PERALES, being duly sworn, deposes and says:

1. That he is an attorney and has been duly admitted to practice law in the State of New York since 1966;

2. That he is the director of the Williamsburg Legal Services Office, 260 Broadway, Brooklyn, New York;

3. That he has worked in the area of poverty law since his admission to the bar and has consequently handled well over one hundred welfare cases;

4. That he has participated in numerous "fair hearings";

5. That the time allotted for said "fair hearings" was frequently insufficient;

6. That "fair hearings" which were interrupted before completion were frequently not resumed for several weeks;

Affidavit of Cesar A. Perales

7. That a period of *two months* frequently elapsed before determinations were reached in said "fair hearings"; and

8. That "fair hearings" at which improper termination was alleged were as cursory and inadequate as those in which only a few items of clothing were at issue.

Cesar A. Perales

(Sworn to June 20, 1968.)

Plaintiff's Exhibit "18" in Opposition to Defendants' Motions for Summary Judgment

Decision After Fair Hearing in Case of Plaintiff Sheafe

(See Opposite ☞)

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of	:	
RUBY SHEAFE	:	DECISION AFTER FAIR HEARING
from a determination by the New York City Department of Social Services (hereinafter called the agency)	:	

A fair hearing was held at 117 Liberty Street, New York City on March 25, 1968, before Frederick Goldfeder, Referee, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the discontinuance of a grant of Home Relief. An opportunity to be heard having been accorded all interestered parties and the evidence having been taken and due deliberation having been had, it is hereby found:

1) The appellant was in receipt of public assistance from October, 1966 to January 8, 1968. Assistance was discontinued because, according to the notice sent to the appellant by the agency, she refused to permit collateral visits. The agency had asked the appellant's permission to contact a person who had employed the appellant prior to October, 1966, which decision was refused by the appellant.

2) The agency did not tell the appellant the information desired, why it was wanted, or how it would be used. At the hearing, the agency failed to show what information was desired, why it was wanted, or how it would be used or why the contact was necessary to a determination of continued eligibility.

3) It is not disputed that in connection with the agency's initial investigation of the appellant's eligibility for assistance she signed all authorizations for collatical contacts which the agency requested that she sign.

Section 351.7 (b) of the Regulations of the New York State Department of Social Services provides:

> "Where information is sought from collatical sources, other than public records, there shall be a clear interpretation to the applicant, recipient or legally responsible relatives of what information is desired, why it is needed, and how it will be used . . ."

The appellant's failure to permit the collateral investigation in this case was justified by the agency's failure to make the explainations required by the above Regulation, and accordingly, there was no basis for the discontinuance.

DECISION: The agency's determination to discontinue the appellant's grant of Home Relief is hereby reversed.

The agency is hereby directed to restore the grant and to report to the Area 6 Office of the State Department of Social Services its actions pursuant to this decision and Section 84.19 of the Rules of the State Board of Social Welfare.

Dated: Albany, N.Y. 1968

COMMISSIONER

Plaintiff's Exhibit "19" in Opposition to Defendants' Motions for Summary Judgment

Levels of Approval and Review

(See Opposite ☞)

VII. LEVELS OF APPROVAL AND REVIEW

TABLE OF CONTENTS

Page No.

A. Chart of Levels of Approval for Assistance, Care and Service 1

B. Chart of Actions Requiring Supervisory Review 27

A. CHART OF LEVELS OF APPROVAL FOR ASSISTANCE, CARE AND SERVICE

Responsibility for decision-making has been placed in the Welfare Center for all items other than "Exception to Policy". (Exceptions to Policy are defined as items or subject matter not authorized in the Manual of Policies Governing the Administration of Public Assistance.

Furthermore, the Welfare Center's authorization for many items has been placed at a lower supervisory level with emphasis on wider responsibility for decision-making in the Case Unit.

It is understood that administrative flexibility will permit consultation with higher levels of authority in any instance of doubt.

Item No.	Type of Allowance or Service	W.C. Authorization	Special Approval and Required Consultant Recommendation	
1.	Blindness - Expenses Incident to			
	a. Recurring allowance within schedule	Unit Supervisor	—	—
	b. Special allowance for			
	1. Food for guide dog	Unit Supervisor	—	—
	2. Fees and carfare for guide	Unit Supervisor	—	—
	3. Shaving services (see Item 44, Personal Care)			
	4. Fees for errand service	Unit Supervisor	—	—
2.	Boarding Arrangements			
	a. Foster homes for older or handicapped persons (Approved by Bureau of Special Services)			
	1. Rates within schedule	Unit Supervisor	—	—
	2. Rates within schedule, adjusted for therapeutic diet	Unit Supervisor	—	Home Economist
	3. Rates in excess of schedule	Case Supervisor	—	—
	b. Boarding arrangement - ADC recipients (review by Bureau of Special Services)	Case Supervisor	—	—
3.	Brokers' Fees - Payment of	Case Supervisor	C.O. Housing	Housing Adviser

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
Budget Deficit			
A. Grant is $2.50 or less semi-monthly			
1. Authorizing or continuing assistance on a recurring basis.....	Unit Supervisor	___	___
2. Withdrawing assistance.....	Unit Supervisor	___	___
B. No budget deficit exists - allowance to meet special temporary needs (see specific item for additional approvals)....	Unit Supervisor	___	___
Burial Reserve Fund - Establishment of.....	Unit Supervisor	___	Resource Consultant
Business Operated by Client - Authorization of Initial or Continuing Supplementary Assistance.....	Case Supervisor	___	Resource Consultant
Children Boarded with Clients			
A. Budgeting of income received for board			
1. When placement effected by authorized agencies.....	Unit Supervisor	___	___
2. When placement effected by other agencies or individuals.....	Case Supervisor	___	___
B. Budgeting of income received for part-time care.....	Unit Supervisor		Home Economist
CLOTHING - See Item No. 12			
Day Care of Children - Allowance for			
A. In a Day Care Center			
1. Mother employed or seeking employment.....	Unit Supervisor	___	___
2. Mother unable to care for and supervise children due to illness of mother or family members.....	Unit Supervisor	___	Med. Soc. Wkr. Division of Day Care
3. Other reasons (problems within the home).....	Case Supervisor	___	
B. In a private family home.....	Case Supervisor	___	___

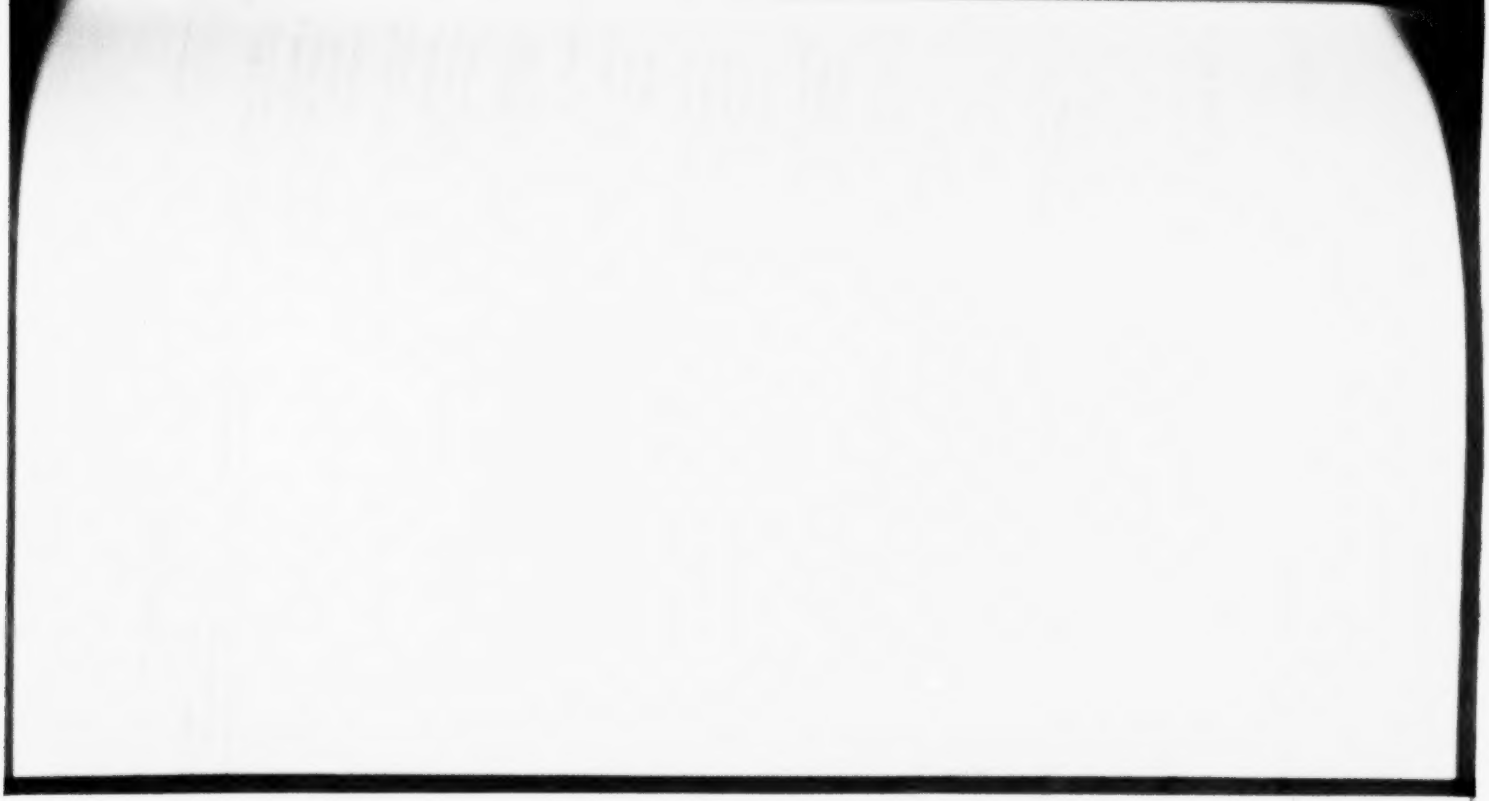


	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
I. Home and Child Care Services - Allowance for:				
	1. Expenses incurred by relative or friend offering care and service without payment in the child's own home.....	Unit Supervisor	—	Home Economist Med. Soc. Worker when illness is a factor
	2. Allowance to meet such person's basic maintenance (on Public Assistance Standard).....	Unit Supervisor	—	—
	3. Child care allowance ($10 semi-monthly per child) to self-maintaining non-legally responsible relative.....	Unit Supervisor	—	—
	4. Wages to person employed to give care and service in the child's own home.....	Case Supervisor	—	Home Economist Empl. Interviewer Med. Soc. Worker when illness is a factor
	5. Wages to person caring for child outside of child's own home (24-hour service).....	Sr. Case Supervisor	—	Home Economist Med. Soc. Worker when illness is a factor
II. Homemaker Service by Department of Welfare				
	1. Max: a. Up to 3 months.....	Unit Supervisor	—	—
	b. After 3 months.....	Case Supervisor	—	—
	2. 24-hour service (for children)			
	a. First two weeks.....	Case Supervisor	—	—
	b. Thereafter.....	Sr. Case Supervisor	—	—
	3. Homemaker provided to client in Home Care Program of private home for the aged or non-profit nursing home (in consultation with Bureau of Special Services).	Unit Supervisor	—	Bur. of Special Serv.
III. Housekeeping and Homemaker Services				
	1. Housekeeping services for adults (aged or handicapped - without children) - Allowance for:			
	1. Fees to friends and neighbors for limited service.....	Case Supervisor	—	Home Economist Med. Soc. Worker when illness is a factor
	2. Wages of domestic worker.....	Case Supervisor	—	Home Economist Med. Soc. Worker when illness is a factor Empl. Interviewer

SEE B.	USE OF ALLOWANCE OR REVIEW	U.S. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
H. Clothing				
A. Recurring allowance				
1. Within schedule	Unit Supervisor	—	—	
2. Adjusted for obese and overaged persons	Unit Supervisor	—	Home Economist	
3. Adjusted for ill or handicapped persons	Unit Supervisor	—	Home Economist	
B. Special allowance (a special allowance is subject to levels of approval prescribed by basis of authorization; maximum amount of grants)				
Basis of authorization:				
1. For clothing included in recurring allowance				
a. Extraordinary or unusual conditions	Unit Supervisor		Med. Soc. Wkr.	
b. Required for attendance to hospital, convalescent, camp or for school's attendance at school	Unit Supervisor	—	—	
c. Adjusted for planned growth for replacement up to accept alternate	Unit Supervisor	—	—	
d. To provide a basic clothing supply	Unit Supervisor	—	Home Economist	
2. Maximum amount of grants				
Age of child	Sum of this grant plus all grants during preceding 11 calendar months			
1	To and including $ 75.00	Unit Supervisor	—	—
	$ 75.01 - 125.00	Case Supervisor	—	—
	over 125.01	Sr. Case Supervisor	—	—
2 - 4	To and including $125.00	Unit Supervisor	—	—
	$125.01 - 200.00	Case Supervisor	—	—
	over 200.01	Sr. Case Supervisor	—	—
5 - 8	To and including $175.00	Unit Supervisor	—	—
	$175.01 - 250.00	Case Supervisor	—	—
	over 250.01	Sr. Case Supervisor	—	—
9 and over	To and including $200.00	Unit Supervisor	—	—
	$200.01 - 300.00	Case Supervisor	—	—
	over 300.01	Sr. Case Supervisor	—	—
3. Not included in cumulative amount of grants:				
1. Layette - Allowance for:	Unit Supervisor	—	—	
2. Replacement of items destroyed in an emergency, such as fire, theft, etc.	Unit Supervisor	—	Home Economist	

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
Debts - Allowance for			
A. Lump-sum payment on loans (after clearance with Credit Clearance Unit, Resource Division)			
If payment is less than cost of replacement.....	Unit Supervisor	—	Home Economist
B. Debts incurred prior to receipt of public assistance			
1. Debt arrears for rent.			
a. Up to two months - where Rent Schedule is within Unit Supervisor's Level of Approval	Unit Supervisor	—	—
b. Up to two months - where Rent Schedule is above Unit Supervisor's Level of Approval	Unit Supervisor	—	Housing Advisor
c. Prior to two-month period	Case Supervisor	—	—
2. Debt arrears for utilities			
Up to four months and including			
$50.00.....	Unit Supervisor	—	—
$50.01 to $100.00.....	Case Supervisor	—	—
Over $100.00.....	Sr. Case Supervisor	—	—
3. Debt arrears for property charges.....	Case Supervisor	Resource Division	Resource Consultant
C. Debts incurred while in receipt of public assistance or while application for public assistance was pending to correct an administrative error or to comply with a Fair Hearing decision			
For two-month period preceding month in which correction is made, if:	Unit Supervisor	—	—
1. Case is open and active during the entire period and the grant was incorrectly computed or inadequate; or:			
2. Action on pending application has been delayed; or:			
3. Payment has been suspended or the case closed in error; or:			
4. A decision to deny an application or close a case has been reconsidered and changed; or:			
5. A Fair Hearing decision has ordered a correction.			

ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
	B. Debts incurred because of client's management problem (see Item 17, Duplication of Assistance)			
14.	Delivery of Checks to Welfare Center			
	A. At the request of client or for his convenience - first and second times.....	Unit Supervisor	—	—
	B. Thereafter, and for the proper administration of the case	Case Supervisor	—	—
15.	Dental Care			
	A. In Department of Welfare dental clinics - for persons 12 years and over			
	1. Non-emergency appointment.....	Med. Soc. Wkr.	—	—
	2. Emergency appointment.....	Med. Soc. Wkr.	Dental Director	—
	3. Reinstatement after dental service was discontinued for cause.....	Med. Soc. Wkr.	Dental Director	—
	B. By panel dentists outside of Department clinics - for homebound persons			
	1. First visit			
	a. Emergency care.....	Med. Soc. Wkr.	—	—
	b. Non-emergency visit to determine dental needs and cost of service.....	Med. Soc. Wkr.	—	—
	2. Additional care.....	Med. Soc. Wkr. Unit Supervisor	Dental Director	—
	3. In dental clinics of hospitals - authorization to provide dental appliances.....	Med. Soc. Wkr.	Dental Director	—

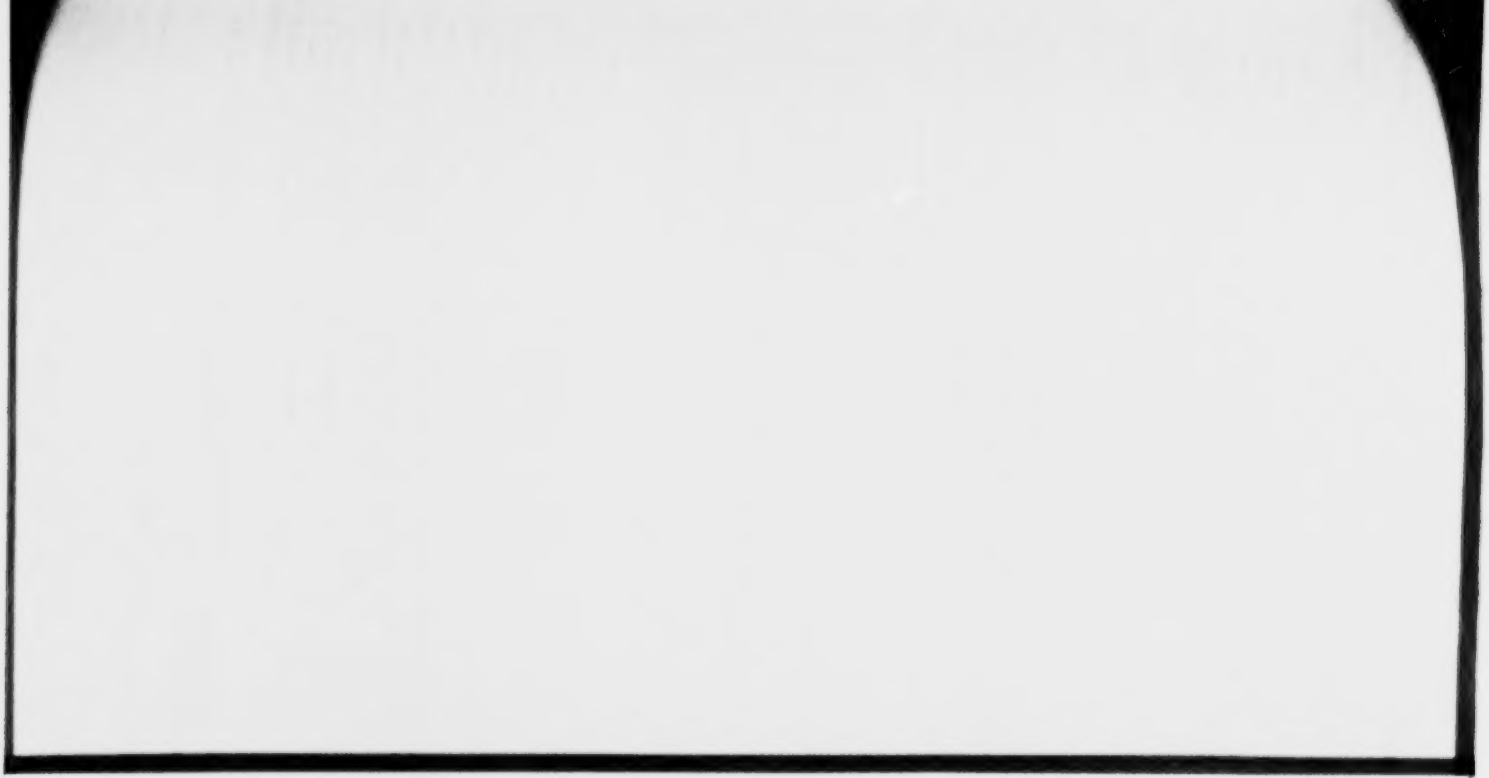


ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
16.	**Disability - Expenses Incident to Age or Disability**			
	A. Recurring allowance within schedule	Unit Supervisor	—	—
	1. Recipient of OAA, AD and AB			
	2. Under categories of ADC, HR or Veteran Assistance:			
	a. A handicapped child receiving specialized services from Board of Education			
	b. A child excluded from school attendance because of handicap			
	c. A recipient of HR or VA receiving nursing home care			
	d. A recipient of HR or VA receiving chronic medical care in his own home			
	e. A recipient of HR or VA classified by DHR as permanently disabled, though not eligible for AD			
	f. An incapacitated parent in an ADC case			
	g. Handicapped adult 60 through 64 years of age, receiving ADC, HR or VA			
	h. A veteran receiving a disability benefit from Veteran's Administration			
	B. Special Allowances for:			
	1. Surgical and orthopedic appliances and prosthetic devices (see Item 60)			
	2. Purchase of hearing aid batteries	Unit Supervisor	—	—
17.	**Duplication of Assistance**			
	A. Required to meet urgent needs pending receipt of regular grant (advance payment)	Unit Supervisor	—	—
	B. Required to replace stolen or lost check	Unit Supervisor	—	—
	C. Required to replace proceeds of lost or stolen public assistance check			
	1. First time	Unit Supervisor	—	—
	2. Thereafter	Case Supervisor	—	—
	D. Required to duplicate rent in order to effect rehousing (no misuse of funds involved)	Unit Supervisor	—	—

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
8. Required duplication because of client's management problem			
1. Duplication of food.....	Case Supervisor	—	--
2. Duplication to meet needs other than food.....	Sr. Case Supervisor	—	--
18. Education - Expenses Incident to			
A. Recurring allowance within schedule -			
for school attendance.....	Unit Supervisor	—	—
B. Non-Recurring Allowance.....	Unit Supervisor	—	—
Special Allowances for:			
1. Activity fees, textbooks, locker fees, gym clothing			
2. Shop or laboratory materials or clothing			
3. Expenses incident to graduation			
4. Tuition in an approved vocational training school for a recipient of AB or a person for whose children ADC is provided.....	Unit Supervisor	—	Division of Employment and Rehabilitation
19. Emergency Assistance			
A. Allowance to meet recurring needs (Special Roll check)			
1. First grant.....	Unit Supervisor	—	—
2. Second grant.....	Unit Supervisor	—	—
3. Subsequent grants.....	Case Supervisor	—	—
B. Special allowance to meet other needs (Special Roll check)			
1. First grant (see specific item for additional approvals)...	Unit Supervisor	—	—
2. Second grant (see specific item for additional approvals)...	Unit Supervisor	—	—
3. Thereafter.....	Case Supervisor	—	—
C. Emergency cash allowance			
1. To meet food, rent or fuel costs for the period of the emergency grant (rent - one week) (under $10)			
a. First grant.....	Unit Supervisor	—	—
b. Second grant.....	Case Supervisor	—	—
2. To meet needs other than food, rent or fuel (under $10)....	Unit Supervisor	—	—
3. Any emergency cash allowance over $10.....	Case Supervisor	—	—

TYPE OF ALLOWANCE OR SERVICE	W.C. ABBREVIATION	SPECIAL APPROVAL AND REQUIRED CONCURRENT RECOMMENDATIONS	
b. Emergency check allowance			
1. To meet food, rent or fuel costs for the period of the emergency grant			
a. First grant.....	Unit Supervisor	—	—
b. Second grant.....	Case Supervisor	—	—
2. To meet rent beyond the period covered by the first grant.....	Case Supervisor	—	—
3. To meet needs other than food, rent or fuel (recurring or non-recurring).....	The level of approval is the same as if it were not an emergency.		
8. Special allowance to persons affected by fires - other disasters - during working hours			
1. To persons not in receipt of public assistance			
a. Shelter and food not in excess of $1.50 per person - at scene of disaster.....	Case Worker	—	—
b. Additional emergency assistance - formal application required (See A, B, C, D, above)			
2. To persons in receipt of public assistance			
a. Immediate needs at scene of disaster.....	Case Worker	—	—
b. Additional needs (see specific item for level of approval required)			
9. Special allowance to persons affected by fires and other disasters - during other than working hours.....	Sr. case staff member at scene of disaster	—	—

NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
1.	**Employment**			
	A. Expenses incident to employment			
	1. Recurring allowance.....	Unit Supervisor	—	—
	2. Special allowance for clothing, tools and fees....	Unit Supervisor	—	—
	B. Expenses incident to securing employment.....	Unit Supervisor	—	—
	C. Fees to Commercial Employment Agencies.....	Unit Supervisor	—	Division of Employment and Rehabilitation
	D. Needs of:			
	1. Employed adult other than homemaker, severely handicapped or blind person.....	Unit Supervisor	—	—
	2. Employed homemaker.....	Unit Supervisor	—	—
	3. Employed minor.....	Unit Supervisor	—	—
	4. Employed severely handicapped person.....	Unit Supervisor	—	—
	E. Application of Income			
	1. For employed MR Recipient formation of such additions. income or resources as needed under a specific plan toward self-maintenance, not to exceed one year.....	Adm. Supervisor	Commissioner	—
	2. For After-School or Vacation Employment of a Child or Minor receiving ADC or MR Use of funds for educational purposes.....	Case Supervisor	—	—
11.	**Establishment of a Home**			
	A. Plans for initial establishment or re-establishment of home....	Case Supervisor	—	—
	B. Allowance for furniture and furnishings.....	Case Supervisor	—	Home Economist
	C. In Emergencies - Basic Furnishings.....	Unit Supervisor	—	—
12.	**Food**			
	A. Recurring allowance within schedule.....	Unit Supervisor	—	—
	B. Allowance for meals provided by private homes for the aged to non-residents who are members of the Home Care Program (computed by Bureau of Special Services).....	Unit Supervisor	—	—
	C. Therapeutic diet allowance (see Item 62)			
	D. Restaurant allowance (see Item 41)			

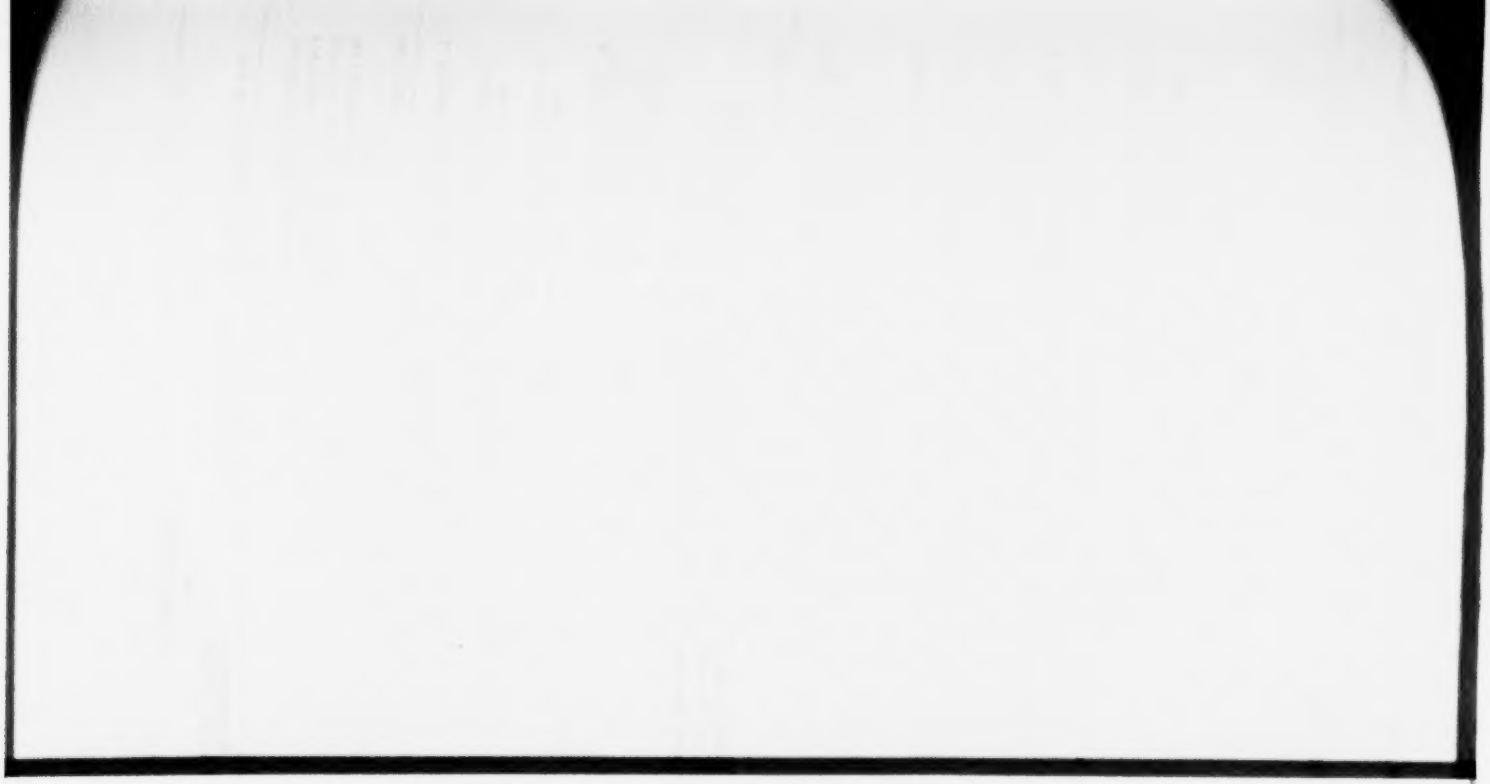


ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
13.	**Fuel for Heating and/or Hot Water - Utilities, Refrigeration**			
	A. Receiving allowance within schedule	Unit Supervisor	—	—
	B. Adjusted allowance	Unit Supervisor	—	Home Economist
	C. Approved restricted allowance in excess of schedule (see Item 55)	Case Supervisor	—	—
14.	**Fumigation Fees - Allowance for**	Unit Supervisor	—	—
15.	**Guide Fees and Carfare for (see Items 1, Blindness - Expenses Incident to, and 16. Disability - Expenses Incident to)**			
16.	**Guide Dog - Food for (see Item 1, Blindness - Expenses Incident to)**			
17.	**Hospitalization of Recipients**			
	A. Special allowance for clothing, appliances, etc. (see specific item for level of approval)			
	B. Special allowance for rent and minimum utilities when required to retain living quarters			
	1. First through fourth semi-monthly periods following hospitalization	Unit Supervisor	—	Med. Soc. Wkr.
	2. Fifth through twelfth semi-monthly periods	Case Supervisor	—	Med. Soc. Wkr.
	C. Allowance for board rate - residents of homes for the aged or institutions for the blind and non-profit nursing homes, temporarily hospitalized outside the home			
	1. First and second semi-monthly periods following hospitalization - full rate	Unit Supervisor	—	Med. Soc. Wkr.
	2. Third through sixth semi-monthly periods - rate computed by Bureau of Special Services	Case Supervisor	—	Med. Soc. Wkr.
	3. Seventh through twelfth semi-monthly periods - rate computed by Bureau of Special Services	Sr. Case Supervisor	—	Med. Soc. Wkr.

	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION
17.	**Hotel Accommodations (see Item 58, Shelter Allowance for)**		
18.	**Household Furniture, Furnishings and Equipment**		
	Allowance for (other than for Establishment of a Home, as provided in Item 21)		
	a. Any household item requested for furnished accommodations	Unit Supervisor	___ Home Economist
	b. Purchase, replacement or repair of		
	stove for cooking and/or heating	Unit Supervisor	___ Home Economist Housing Adviser
	Refrigerator	Unit Supervisor	___ Home Economist Housing Adviser
	Sewing Machine	Unit Supervisor	___ Home Economist
	Washing Machine	Unit Supervisor	___ Home Economist
	c. Purchase, replacement or repair of all other furniture or furnishings		
	Size of Family		
	1 - 4 Up to $100.00	Unit Supervisor	___ ___
	$100.01 to 250.00	Unit Supervisor	___ ___
	250.01 to 300.00	Case Supervisor	___ Home Economist
	300.01 and over	Adm. Supervisor	___ Home Economist
	5 - 8 Up to $150.00	Unit Supervisor	___ ___
	$150.01 to 300.00	Unit Supervisor	___ ___
	300.01 to 350.00	Case Supervisor	___ Home Economist
	350.01 and over	Adm. Supervisor	___ Home Economist
	9 and over Up to $175.00	Unit Supervisor	___ ___
	$175.01 to 350.00	Unit Supervisor	___ ___
	350.01 to 400.00	Case Supervisor	___ Home Economist
	400.01 and over	Adm. Supervisor	___ Home Economist
19.	**Household Supplies**		
	a. Recurring allowance within schedule	Unit Supervisor	___ ___
	b. Adjusted recurring allowance	Unit Supervisor	___ Home Economist

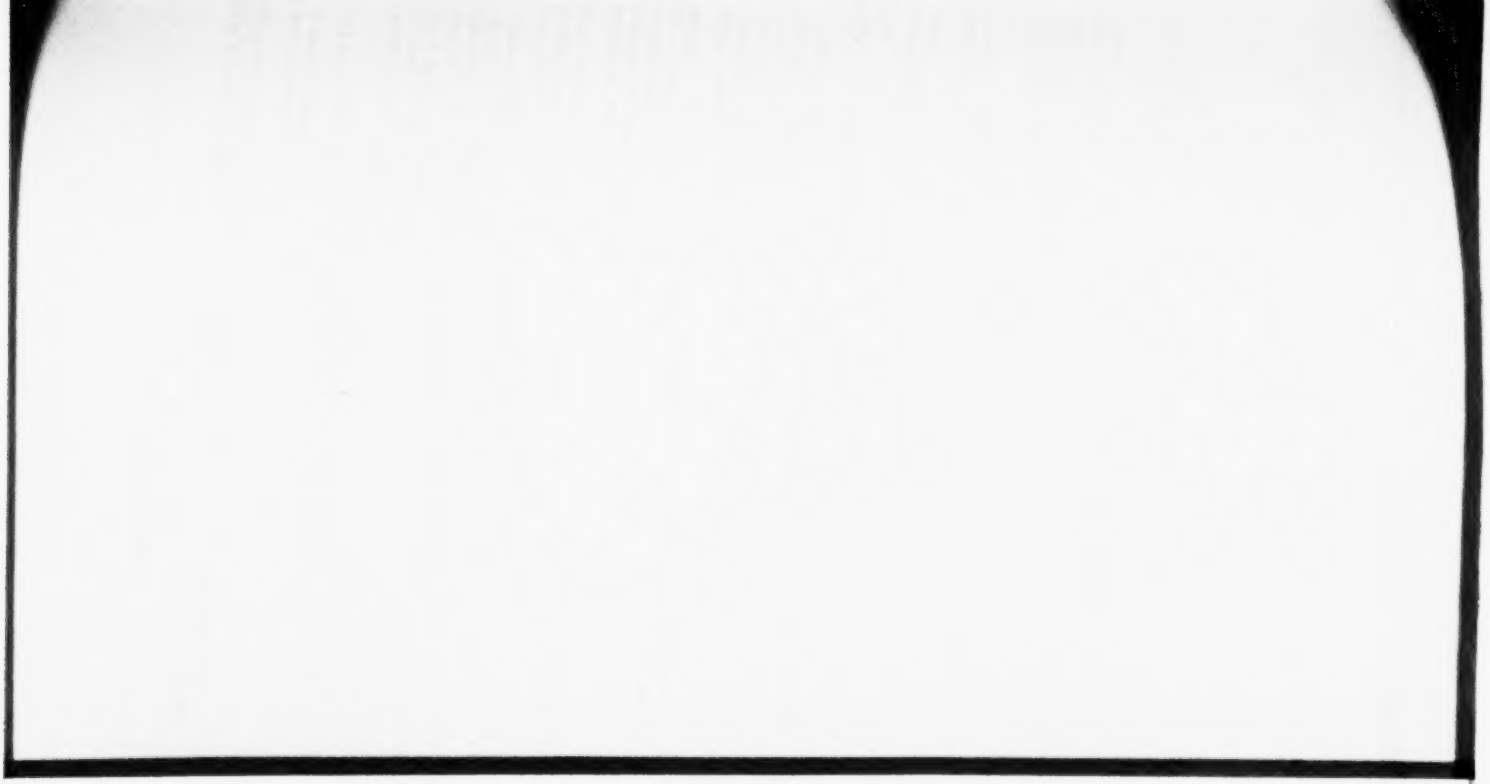


ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
11.	Installment Payments and Payments on Loans (see Item 13, Debts - Allowance for payment of)			
12.	Insurance			
	A. Proceeds from adjustment			
	1. Budgeted to meet recurring needs.....	Unit Supervisor	—	—
	2. Budgeted to meet special needs (see particular item)			
	B. Proceeds from assigned insurance of deceased client - to meet special needs of surviving members of family			
	Up to $250.00.....	Unit Supervisor	—	Resource Consultant
	$250.01 - 350.00.....	Case Supervisor	—	Resource Consultant
	$350.01 and over.....	Adm. Supervisor	—	Resource Consultant
13.	Job Refusal			
	A. Withdrawal or Continuance of Assistance			
	1. Single Person.....	Unit Supervisor	—	—
	2. Family.....	Case Supervisor	—	—
14.	Laboratory Tests			
	A. In client's home.....	Med. Soc. Wkr.	Medical Director	—
15.	Laundry			
	A. Allowance within schedule.....	Unit Supervisor	—	—
	B. Adjusted Allowance.....	Unit Supervisor	—	Home Economist
	C. Personal laundry for client in a Nursing Home (see Item 40, Nursing Home Care)			



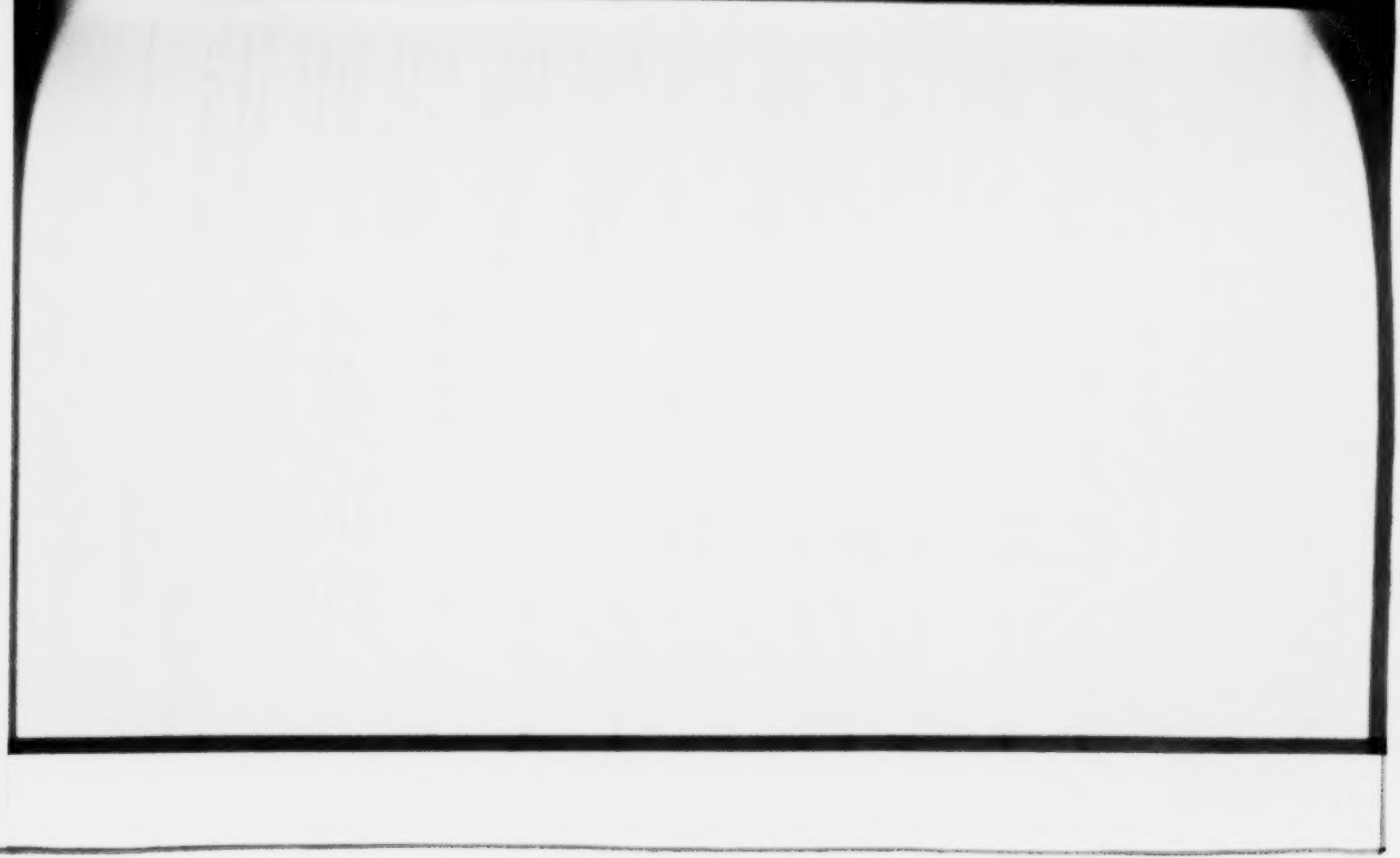
	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
	Lawsuits - Proceeds from			
1.	Release of proceeds for maintenance for a two-year period	Unit Supervisor	—	—
2.	Withholding all or part of two-year maintenance allowance (in consultation with Division of Legal Services)	Case Supervisor	—	—
	Lodger, Boarder, Boarder/Lodger - Recurring Allowance for Expenses Incident to			
1.	One or more persons			
	1. Basic items as listed in schedule	Unit Supervisor	—	—
	2. Additional items as listed in schedule	Unit Supervisor	—	Home Economist
	Medical Service			
1.	Care in the client's home, private proprietary nursing home, home for the aged or institution for the blind (when not included in rate)			
	1. For acute illness	Med. Soc. Wkr.	—	—
	2. For chronic illness	Unit Supervisor Med. Soc. Wkr.	Med. Director	—
	3. By medical consultant or specialist	Med. Soc. Wkr.	Med. Director	—
	4. Examination by orthopedist when physician recommends an appliance for a homebound client	Med. Soc. Wkr.	Med. Director	—
2.	Obstetrical care in client's home	Med. Soc. Wkr.	Med. Director	—
3.	Medical examination required by the Department	Med. Soc. Wkr.	—	—
4.	Premarital physical examination	Unit Supervisor Med. Soc. Wkr.	—	—
	Moving Expenses - Allowance for			
1.	Change of residence (See Home Economist's Guide for number of hours and amount)	Unit Supervisor	—	—
2.	Removal from redevelopment site	Unit Supervisor	—	Housing Advisor

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
Nursing Home Care			
a. In private proprietary home, recurring allowance for			
1. Rate within schedule.....	Med. Soc. Wkr. Unit Supervisor	Med. Director	___
b. In private non-profit home,			
1. Recurring allowance at rate set by Bureau of Special Services.....	Unit Supervisor	Med. Director	___
2. Application from private-paying patient (in consultation with Bureau of Special Services).....	Unit Supervisor	Med. Director	___
c. Removal to another nursing home (in consultation with Bureau of Special Services).....	Unit Supervisor	___	Med. Soc. Worker
d. Temporary "in home" care for a client in a Home Care Program of a non-profit nursing home (in consultation with Bureau of Special Services).....	Unit Supervisor	Med. Director	Dir. of Special Services
e. Personal Laundry			
1. Recurring allowance for fee set by home (in consultation with Bureau of Special Services).....	Unit Supervisor	___	___
2. Recurring allowance for commercial service.....	Unit Supervisor	___	Home Economist
Old Age - Expenses Incident to..	Unit Supervisor	___	___
Optical Care			
a. In Department's Eye Examination Station.....	Unit Supervisor	___	___
b. Eyeglasses for children under 18 who are not attending school.....	Unit Supervisor Med. Soc. Wkr.	___	___
c. Optical care in client's home, private proprietary nursing home, home for the aged or institution for the blind (when not included in rate).....	Unit Supervisor Med. Soc. Wkr.	Med. Director	___
d. Delivery by vendor to client's home or to hospital, etc.....	Med. Soc. Wkr.	Med. Director	___



ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
44.	Personal Incidentals			
	A. Recurring allowance within schedule	Unit Supervisor	—	—
	B. Adjusted recurring allowance.....	Unit Supervisor	—	Home Economist
45.	Personal Property (Other than Securities and Mortgages) - Proceeds from Sale of			
	A. Release of proceeds for maintenance for a one-year period.....	Unit Supervisor	—	—
	B. Withholding all or part of one-year maintenance allowance (in consultation with Division of Legal Services).....	Case Supervisor	—	Division of Legal Services
46.	Pharmaceutical Supplies			
	A. Regular authorization.....	Med. Soc. Wkr.	—	—
	B. Standing order.....	Med. Soc. Wkr.	Med. Director	—
	C. Special medications or excessive quantities.....	Med. Soc. Wkr.	Med. Director	—
	D. Prescriptions from City hospitals or clinics specified "Cannot be met by hospital".....	Med. Soc. Wkr.	Med. Director	—
47.	Podiatrist's Services			
	A. In client's home or podiatrist's office.....	Med. Soc. Wkr.	—	—
	B. For clients residing in private proprietary nursing homes (other than pedicures provided by home)..	Med. Soc. Wkr.	—	—
48.	Premium Payments			
	A. Allowance provided by Department..	Case Supervisor	Resource Div.	Resource Consultant
	B. Advance premiums in excess of six months - from proceeds of insurance adjustment.....	Unit Supervisor	Resource Div.	Resource Consultant

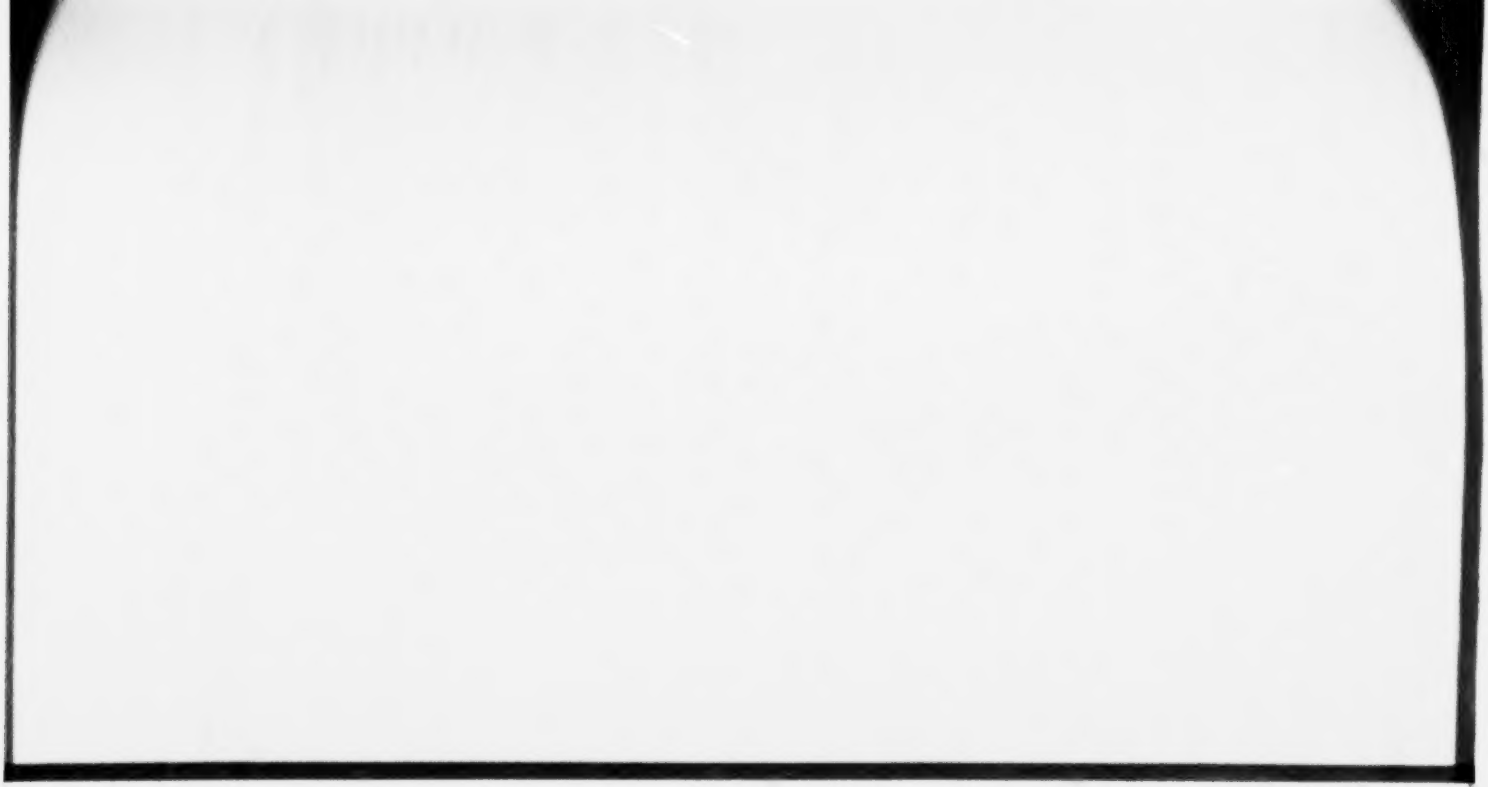
NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
M.	Private Homes for the Aged or Blind - Assistance to Residents of			
	A. At board rate set by Bureau of Special Services			
	1. Domiciliary care.....	Unit Supervisor	—	—
	2. Infirmary care.....	Unit Supervisor	Medical Director	
	B. Application from a private-pay resident (in consultation with Bureau of Special Services.....	Unit Supervisor	—	Bur. of Special Services
	C. If "life-care" agreement has been suspended by the State Department (after clearance with Bureau of Special Services).....	Unit Supervisor	—	Bur. of Special Services
	D. Temporary "in home" care for a client in a Home Care Program (in consultation with Bureau of Special Services).....	Unit Supervisor	—	Bur. of Special Services
N.	Psychiatric Examination....	Case Supervisor Med. Soc. Wkr.	Medical Director	—
O.	Real Property			
	A. Home owned and occupied by client			
	1. Recurring allowance for			
	a. Carrying charges - no amortization payments...	Unit Supervisor	Resource Division	Resource Consultant
	b. Carrying charges - including amortization payments...	Unit Supervisor	Resource Division	Resource Consultant
	2. Repairs - special allowance for			
	-up to $50.00.....	Unit Supervisor	Res.Div.	Resource Consultant
	-over $50.00.....	Case Supervisor	Res.Div.	Resource Consultant
	B. Home owned and to be occupied by client - recurring allowance for carrying charges, with or without amortization.....	Case Supervisor	Resource Division	Resource Consultant
	C. Other types of real property - waiver of listing property for sale.....	Sr. Case Supervisor	Resource Division	Resource Consultant
P.	Registration Card for Alien - Fee for Replacement of.....	Unit Supervisor	—	—



	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
3.	Rent			
	A. Recurring allowance (see Item 58, Shelter - Allowance for)			
	B. In advance (for period subsequent to current payment cycle)			
	1. For new occupancy.....	Unit Supervisor	—	Housing Adv ser
	2. For any other reason.....	Case Supervisor	—	—
	C. Recurring allowance for client residing in a residence club.....	Unit Supervisor	—	Housing Adviser
4.	Restaurant Allowance			
	A. Cooking facilities available			
	1. Inability to prepare meals....	Unit Supervisor	—	Med. Soc. Wkr.
	2. Inadequate facilities - partial restaurant allowance.....	Unit Supervisor	—	Housing Adviser
	B. No cooking facilities			
	1. Adults.....	Unit Supervisor	—	Housing Adviser
	2. Families with children.....	Case Supervisor	—	Housing Adviser
5.	Restricted Payment or Restrictive Practice - initially and for each six-month period	Sr. Case Supervisor	—	—
6.	School Attendance - Continuance or Public Assistance			
	A. Subsequent to high school graduation -			
	1. For trade or technical school....	Case Supervisor	—	—
	2. For college attendance.....	Sr. Case Supervisor	—	—
	B. For Veteran, under G.I. Bill.....	Unit Supervisor	—	—

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND	REQUIRED CONSULTANT RECOMMENDATION
Security Deposit (assignment required)			
a. Payment required by a prospective private landlord (controlled or uncontrolled premises).....	Unit Supervisor	—	Housing Adviser
b. Payment required by N.Y.C. Housing Authority (Public Housing Project)	Unit Supervisor	—	—
c. Payment required by Utility Company			
1. To and including $75.00..	Unit Supervisor	—	—
2. $75.01 to $125.00.....	Case Supervisor	—	—
3. $125.01 and over.....	Sr. Case Supervisor	—	—
Shelter - Allowance for			
a. Private housing			
Note: Authorization of rent is limited to two issues, pending determination of legal rent (M-640e).			
1. Unfurnished Self-Contained Unit* (Controlled and Decontrolled with Central Heating)			
1 person			
RENT (Heat and Hot Water Included)			
Up to $ 75.00 monthly....	Unit Supervisor	—	—
$75.01 - 90.00 monthly....	Case Supervisor	—	—
$90.01 - 100.00 monthly....	Sr. Case Supervisor	—	—
Over $100.00.....	Adm. Supervisor	—	—
2 or 3 persons			
RENT (Heat and Hot Water Included)			
Up to $ 85.00 monthly....	Unit Supervisor	—	—
$85.01 - 100.00 monthly....	Case Supervisor	—	—
$100.00 - 110.00 monthly....	Sr. Case Supervisor	—	—
Over $110.00.....	Adm. Supervisor	—	—

*Self-Contained Unit is one where family has a private kitchen and private toilet facilities.



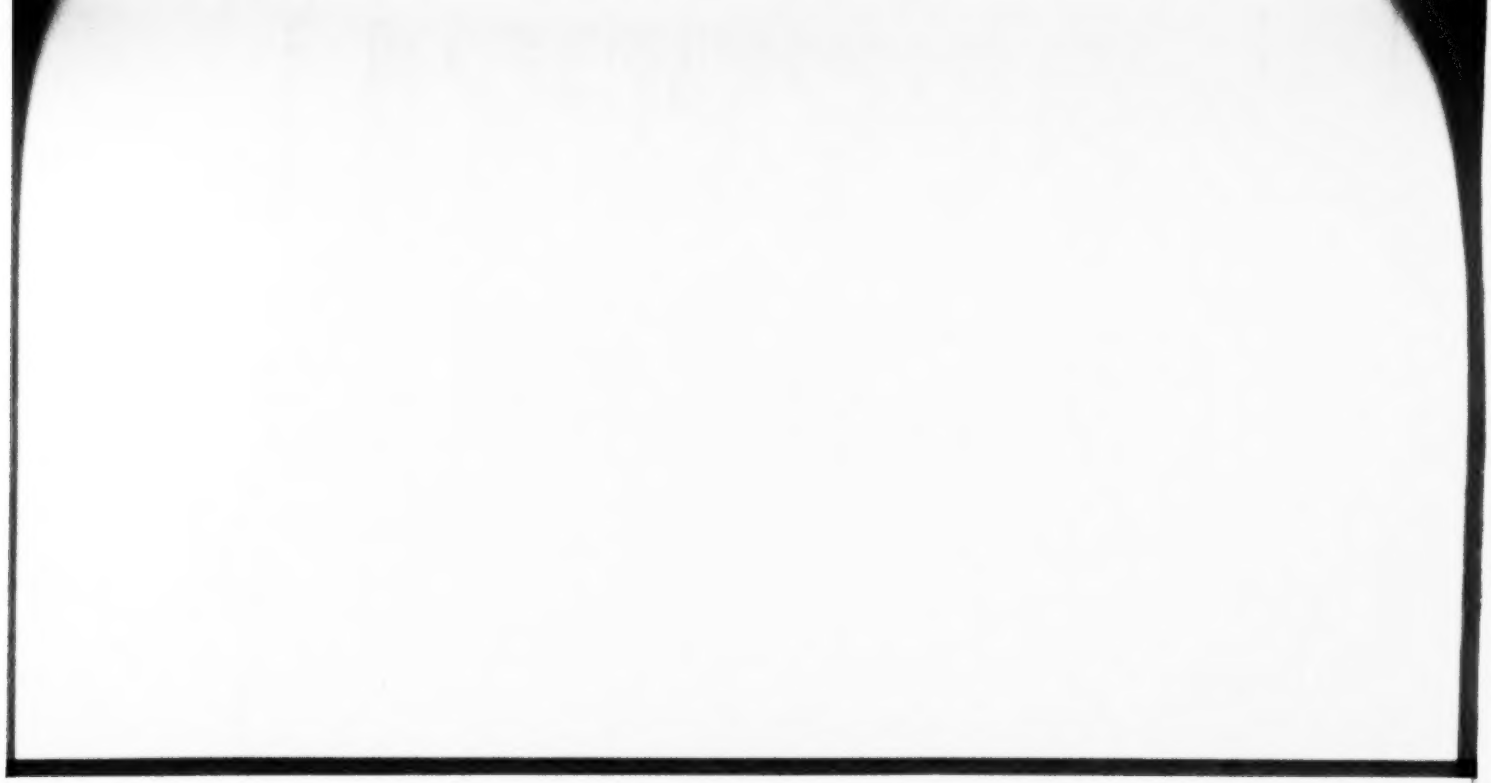
TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
4 or 5 persons			
RENT (Heat and Hot Water included)			
Up to $105.00 monthly.....	Unit Supervisor	—	—
$105.01 - 125.00 monthly.....	Case Supervisor	—	—
$125.00 - 135.00 monthly.....	Sr. Case Supervisor	—	—
Over $135.00 monthly	Adm. Supervisor	—	—
6 persons			
RENT (Heat and Hot Water included)			
Up to $115.00 monthly.....	Unit Supervisor	—	—
$115.01 - 140.00 monthly.....	Case Supervisor	—	—
$140.01 - 150.00 monthly.....	Sr. Case Supervisor	—	—
Over $150.00 monthly	Adm. Supervisor	—	—
7 or 8 persons			
RENT (Heat and Hot Water included)			
Up to $125.00 monthly.....	Unit Supervisor	—	—
$125.01 - 150.00 monthly.....	Case Supervisor	—	—
$150.01 - 160.00 monthly.....	Sr. Case Supervisor	—	—
Over $160.00 monthly	Adm. Supervisor	—	—
9 persons and over			
RENT (Heat and Hot Water included)			
Up to $135.00 monthly.....	Unit Supervisor	—	—
$135.01 - 175.00 monthly.....	Case Supervisor	—	—
$175.01 - 185.00 monthly.....	Sr. Case Supervisor	—	—
Over $185.00 monthly.....	Adm. Supervisor	—	—

Note: The adequacy of the living arrangements in terms of the number of rooms and persons in the household should be carefully considered and discussed with Housing Adviser, when there is question as to adequacy.

Before an apartment in a one- or two-family house, or an entire private house, is acceptable for occupancy, the following data is necessary for discussion with the Housing Adviser:

1. Is landlord responsible for internal and external repairs?
2. Is landlord responsible for payment of fuel for heat and hot water?
3. Is landlord responsible for maintenance repairs, and replacement of refrigerator and stove?
4. Is landlord willing to give a lease?
5. Name and address of landlord.

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
2. Unfurnished Accommodations (Controlled and Decontrolled, without Central Heat)			
1 person			
Up to $55.00 monthly.....	Unit Supervisor	—	—
$55.01 - 65.00 monthly.....	Case Supervisor	—	—
$65.01 - 75.00 monthly.....	Sr. Case Supervisor	—	—
Over $75.00 monthly	Adm. Supervisor	—	—
2 - 3 persons			
Up to $65.00 monthly.....	Unit Supervisor	—	—
$65.00 - 75.00 monthly.....	Case Supervisor	—	—
$75.01 - 85.00 monthly.....	Sr. Case Supervisor	—	—
Over $85.00 monthly.....	Adm. Supervisor	—	—
4 - 5 persons			
Up to $ 90.00 monthly....	Unit Supervisor	—	—
$90.01 - 90.00 monthly....	Case Supervisor	—	—
$90.01 - 100.00 monthly....	Sr. Case Supervisor	—	—
Over $100.00 monthly.....	Adm. Supervisor	—	—
6 persons			
Up to $ 90.00 monthly...	Unit Supervisor	—	—
$90.01 100.00 monthly...	Case Supervisor	—	—
$100.01 - 110.00 monthly...	Sr. Case Supervisor	—	—
Over $110.00 monthly	Adm. Supervisor	—	—
7 - 8 persons			
Up to $100.00 monthly...	Unit Supervisor	—	—
$100.01 - 110.00 monthly...	Case Supervisor	—	—
$110.01 - 120.00 monthly...	Sr. Case Supervisor	—	—
Over $120.00 monthly.....	Adm. Supervisor	—	—
9 persons and over			
Up to $120.00 monthly...	Unit Supervisor	—	—
$120.01 - 130.00 monthly...	Case Supervisor	—	—
$130.01 - 140.00 monthly...	Sr. Case Supervisor	—	—
Over $140.00 monthly.....	Adm. Supervisor	—	—



TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
1. Furnished accommodations (Controlled and Decontrolled with Control Heating)			
a. With cooking facilities			
1 person			
To and including $75.00 monthly	Unit Supervisor	___	___
$75.01 - $90.00 monthly	Case Supervisor	___	___
$90.01 and over monthly	Sr. Case Supervisor	___	___
2 or 3 persons			
To and including $95.00 monthly	Unit Supervisor	___	___
$95.01 - $120.00 monthly	Case Supervisor	___	___
$120.01 and over monthly	Sr. Case Supervisor	___	___
4 or 5 persons			
To and including $115.00 monthly	Unit Supervisor	___	___
$115.01 - $130.00 monthly	Case Supervisor	___	___
$130.01 and over monthly	Sr. Case Supervisor	___	___
6 or more persons			
To and including $120.00 monthly	Unit Supervisor	___	___
$120.01 - $135.00 monthly	Case Supervisor	___	___
$135.01 and over monthly	Sr. Case Supervisor	___	___
b. No cooking facilities (prior consultation with Housing Adviser required if client able to prepare own meals)			
1 person			
To and including $60.00 monthly	Unit Supervisor	___	___
$60.01 - $75.00 monthly	Case Supervisor	___	___
$75.01 and over monthly	Sr. Case Supervisor	___	___
2 or more persons			
To and including $75.00 monthly	Unit Supervisor	___	___
$75.01 - $85.00 monthly	Case Supervisor	___	___
$85.01 and over monthly	Sr. Case Supervisor	___	___
2. Public Housing*			
1. Low Cost Housing Projects	Unit Supervisor	___	___
2. Other public housing (see A.1, Unfurnished accommodations)			

*Acceptance of a case in a Housing Project, must be accompanied by written notice to the Housing Authority indicating acceptance and the amount of monthly rent.

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
c. Hotels			
1. Adult and adult groups without children			
a. With cooking facilities (see A.3.a, Furnished accommodations with cooking facilities)			
b. No cooking facilities			
(1) Persons unable to prepare own meals (see A.3.b, Furnished accommodations - No cooking facilities)			
(2) Persons able to prepare own meals			
One person			
First Month.....	Case Supervisor	—	—
Second and subsequent months.....	Sr. Case Supervisor	—	—
Two or more persons			
First month.....	Case Supervisor	—	—
Second and subsequent months.....	Sr. Case Supervisor	—	—
2. Families with children			
First two weeks.....	Sr. Case Supervisor	—	Housing Advisor
Third and subsequent weeks.....	Adm. Supervisor	—	Housing Advisor
b. Rent Owners (see Item 51, Real Property)			
Storage Charges			
a. Encumbrance Division, Department of Sanitation			
1. Redemption fee ($5.00)	Unit Supervisor	—	—
2. Redemption fee and storage fee..	Unit Supervisor	—	Home Economist
b. Storage Charges			
If payment (plus moving is less than cost of replacement)			
Up to $100.00.....	Unit Supervisor	—	Home Economist
$100.01 to $200.00.....	Case Supervisor	—	Home Economist
Over $200.00.....	Sr. Case Supervisor	—	Home Economist
Surgical and Orthopedic Appliances, Orthopedic Shoes and Prosthetic Devices			
a. Purchase, replacement or repair			
1. When cost is $20.00 or less..	Med. Soc. Wkr.	—	—
2. When cost is in excess of $20.00.....	Med. Soc. Wkr.	Medical Director	—
3. When off-contract appliance is listed on maximum price schedule and price quotation exceeds approved maximum.....	Med. Soc. Wkr.	Medical Director	—

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
B. Approval for			
1. Purchase of a major appliance..	Med. Soc. Wkr. Case Supervisor	Med. Director	—
2. Purchase of any appliance for a hospitalized client which requires opening or reopening of case.....	Med. Soc. Wkr. Case Supervisor	—	—
C. Purchase and repair of hearing aid.....	Med. Soc. Wkr.	Med. Director	—
D. Rental of appliance.....	Med. Soc. Wkr.	Med. Director	—
E. Home fitting of appliance.....	Med. Soc. Wkr.	—	—
11. Telephone Service			
A. When cost is met by the public assistance family through exclusion allowances or available income; or by non-legally responsible relatives or unrelated persons....	Unit Supervisor	—	—
B. When payment is requested of the Department (Recurring Allowance)			
1. On medical basis.....	Unit Supervisor	—	Med. Soc. Wkr.
2. For business or employment.....	Unit Supervisor	—	Resource Consultant
3. For other reasons as part of a specific plan of service.....	Sr. Case Supervisor	—	—
12. Therapeutic Diet Allowance			
A. On written recommendation from			
1. Hospital or clinic.....	Unit Supervisor	—	Home Economist
2. Private physician (after review by Medical Social Worker).....	Unit Supervisor	—	Home Economist
B. Continued(for four semi-monthly periods) when renewal request not received on time			
1. Recommended originally by hospital or clinic.....	Unit Supervisor	—	Home Economist
2. Recommended originally by private physician (after review by Medical Social Worker).....	Unit Supervisor	—	Home Economist
C. For tubercular person or TB contact pending receipt of written medical recommendation (for four semi-monthly periods).....	Unit Supervisor	—	Home Economist

ITEM NO.	TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REQUIRED CONSULTANT RECOMMENDATION	
G.	Transportation - Allowance for			
	a. Absence or removal from New York City	Special Services Welfare Center only	—	—
	b. Day Care Center for the Aged	Unit Supervisor	—	—
	c. Employment	Unit Supervisor	—	—
	d. Medical care			
	1. Public Transportation	Unit Supervisor	—	—
	2. Taxi fare	Unit Supervisor	—	—
	3. Authorization to voluntary hospital to issue taxi fare	Med. Soc. Wkr.	—	—
	e. Recreation Center for the Blind	Unit Supervisor	—	—
	f. School attendance	Unit Supervisor	—	—
	g. Search for employment			
	1. In receipt of SIB or Unemployment Compensation for Veteran	Unit Supervisor	—	—
	2. To specific employment sources	Unit Supervisor	—	—
	h. Training and rehabilitation	Unit Supervisor	—	—
	i. Visit to relative in institution or children placed away from home			
	1. Minimum fare	Unit Supervisor	—	—
	2. Other expenses in addition to minimum fare	Case Supervisor	—	—
	j. For person home on leave from institution	Unit Supervisor	—	—
	k. Other essential verified Transportation needs	Unit Supervisor	—	—
H.	Unemancipated Minor - Assistance to	Sr. Case Supervisor	—	—
II.	Uniform Support of Dependents Law - Allowance for Court Fees	Unit Supervisor	—	—

TYPE OF ALLOWANCE OR SERVICE	W.C. AUTHORIZATION	SPECIAL APPROVAL AND REGIONAL CONSULTANT RECOMMENDATION	
H. Union Dues - Payment of			
1. To obtain employment			
($0 to $50.00)	Unit Supervisor	—	—
($50.01 and over)	Case Supervisor	—	—
2. While employed	Unit Supervisor	—	—
3. To safeguard benefits while employed or retired	Case Supervisor	—	Resource Consultant
I. Unrelated Child - Assistance to			
Initial approval	Sr. Case Supervisor	—	—
Subsequent approval	Case Supervisor	—	—
J. Visiting Nurse Care and Service			
A. Requested by physician			
1. Two visits or less per calendar month	Med. Soc. Wkr.	—	—
2. More than ten visits per calendar month	Med. Soc. Wkr.	Med. Director	—
3. More than one visit per day	Med. Soc. Wkr.	Med. Director	
B. Emergency basis (limited to two visits)	Med. Soc. Wkr.	—	—
C. For clients in private homes for the aged and institutions for the blind (when not included in rate)	Med. Soc. Wkr.	Med. Director	—
D. In special situations			
1. Compensation, medico-legal cases - in excess of one visit	Med. Soc. Wkr.	Med. Director	—
2. Obstetrical cases (home delivery)			
a. Prenatal care in excess of one visit	Med. Soc. Wkr.	Med. Director	—
b. Parturition and postpartum care	Med. Soc. Wkr.	—	—
3. Insulin injections			
a. In the home	Med. Soc. Wkr.	—	—
b. In the Visiting Nurse Treatment Center	Med. Soc. Wkr.	Med. Director	—
E. Physiotherapy in the Home or in the Visiting Nurse Treatment Center	Med. Soc. Wkr.	Med. Director	—



B. CHART OF ACTIONS REQUIRING SUPERVISORY REVIEW

ACTION	WELFARE CENTER REVIEW	SPECIAL REVIEW AND CONSULTANT'S RECOMMENDATION	
1. Aid to the Disabled Grant Reauthorized (Six Semi-Monthly Periods) when Form AD-3 Not Received in Time for Recertification	Unit Supervisor	—	—
2. Aid to the Disabled Medical Examination - Refusal of	Case Supervisor	—	Med. Soc. Wkr.
3. Appeal to the State Department of Social Welfare - Report to Fair Hearings Section of Action Taken on Decision	Case Supervisor	—	—
4. Burial out of Town - Release of Assigned Assets for	Unit Supervisor	Resource Dev.	—
5. Child Placement - Referral for:			
a. Temporary or Foster Care	Case Supervisor	—	—
b. Placement because of improper care in the home	Case Supervisor	—	—
6. Employment Classification - Application of "Personality Limitations" Code	Case Supervisor	—	—
7. Family Court - Support and Conciliation Term			
a. Referral to			
1. Client is the petitioner	Unit Supervisor	—	—
2. Department of Welfare acts in behalf of the petitioner	Case Supervisor	—	—
b. Request for opinion on the possibility of Court Action prior to referral	Case Supervisor	Division of Family Support	—
8. Insurance Adjustments - Waiver in Short-Term Case	Unit Supervisor	—	Resource Consultant
9. Municipal Shelter - Referral of Homeless Men	Unit Supervisor	—	—

ITEM NO.	ACTION	WELFARE CENTER REVIEW	SPECIAL REVIEW AND CONSULTANT'S RECOMMENDATION	
M.	Nursing Homes - Reporting Manifest Neglect of Clients to Bureau of Special Services	Unit Supervisor	—	—
N.	Provision of Care in a Family Home, Boarding Home, Hospital, Institution, Old Age Home, or Nursing Home in Another Public Welfare District in New York State	Sr.Case Supervisor and Special Services Welfare Center	—	—
O.	Requests for Information from and Clearances with:			
	A. Selective Service System.....	Unit Supervisor	Bureau of Public Assistance	—
	B. Railroad Retirement Board.....	Unit Supervisor	—	—
	C. New York City Post Office for address clearance and payment of required fees..	Unit Supervisor	Resource Div.	—
P.	Shelter Care - Referral of Homeless Women	Unit Supervisor	—	—
Q.	Trust Fund of Minor - Use of			
	A. For maintenance of minor.....	Case Supervisor	—	Resource Consultant
	B. When child attains his majority.....	Case Supervisor	—	Resource Consultant
	C. Resulting from personal injuries.....	Unit Supervisor	Resource Div.	Resource Consultant
R.	Trust Fund of Adults	Case Supervisor	Resource Div.	Resource Consultant

Plaintiff's Exhibit "20" in Opposition to Defendants' Motions for Summary Judgment

Article: ***Families on Welfare in New York City***

(See Opposite ☞)

WELFARE in REVIEW

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U.S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

WILBUR J. COHEN, Secretary

SOCIAL AND REHABILITATION SERVICE

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In This Issue Page

Cost-Benefit Evaluation of a Work Experience and Training Project 1
Paul Thoddeus and Philip Rans

Assessing Social Agency Effectiveness 13
Herman D. Stein, George B. Vaughan, and Sample R. Zaiba

White-Nonwhite Income Differences 19

Families on Welfare in New York City 22

Publications of Interest 27

Program and Operating Statistics 30



Families on Welfare in New York City

What are families like who receive welfare assistance? What are their attitudes, preferences and expectations for the future? How many are able to work? How long have they lived in the community? What are the circumstances of their early lives? How many are second generation recipients of assistance? These and many other questions are the concern of welfare administrators, legislators, program planners and a wide cross section of the community. More definitive answers are needed for a better understanding of the nature and effects of welfare programs, and of the problems facing families receiving public assistance in order to develop programs to attack dependency.

In recognition of this need, the Center for Social Research of the City University of New York has prepared a series of Preliminary Reports on welfare families in New York who were receiving assistance in April 1966. Data for the Reports were obtained in the course of conducting a research project dealing with the utilization of health services by welfare recipients.* Selected characteristics of these families are presented without extensive analysis and with the recognition that they represent "social bookkeeping" more than "social research."

Among the characteristics reported were the family's welfare experience, living conditions, education and employment of the mothers, presence or absence of the husband, and nativity and immigration to New York. Tables included in the Reports provide detailed information on welfare families by age, ethnicity, marital status, community of rearing and other relevant variables.

Data in the Reports are based on interviews with a stratified sample of 2,190 families receiving Aid to Families with Dependent Children; Temporary Aid to Dependent Children (families with an unemployed father); and Home Relief (families receiving supplementation of low earnings of an employed father). The latter two categories were overrepresented in order to insure enough two-parent families for analysis, but when generalizing findings to the total welfare population as of April 1966 a weighting procedure was used.

The results of the investigation included in this review are descriptive of the total caseload of families on welfare in New York City in April 1966, as projected from information obtained from the sample. However, the Reports contain a note of caution that findings do not necessarily describe the present caseload as there has been a considerable increase in the number of families receiving assistance in New York City since the time the survey was conducted.

SOME MAJOR FINDINGS

Fifty percent of the families on welfare in New York City in April 1966 were Negro, 40 percent were Puerto Rican and 10 percent were white. Husbands were present in more than one-fourth of the households. Ten percent of the mothers were either divorced or widowed and nearly 20 percent were unmarried. Mothers were without husbands due to separation or desertion in over 40 percent of the families. It is noted that the high rate of desertion as a cause of dependency is given little attention and that research has been lacking in

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*The research is supported by a Public Health Service grant from the Division of Community Health Services, Department of Health, Education, and Welfare. Lawrence Podell, Professor of Urban Studies at the City University of New York and formerly with the Department of Social Services of New York City, directed the project and authored the Reports. He is currently directing two additional projects supported by the Social and Rehabilitation Service, Department of Health, Education, and Welfare, dealing with the organization of social services and the retention of social service personnel.

recent years on separation and desertion in low-income families.

A finding of interest was that most deserted mothers reported that the separation from the husband occurred following the family's first receipt of assistance rather than before. The author comments that this sequence of events is contrary to customary expectation and may indicate an opportunity for prevention of family breakdown when the family is known to the welfare department before the separation occurs.

Nearly 40 percent of the mothers were under 30 years of age, 40 percent were in their thirties and the remaining 20 percent were 40 years of age or older. Two-thirds of the families had three or more children in the home under 18 years of age, and two-thirds had preschool age children. Nearly all of the mothers in the sample who were in their teens and twenties had preschool children; over 60 percent of Negro and Puerto Rican women in this age range either had very young infants or were pregnant at the time of the survey.

Only 11 percent of the welfare families lived in public housing. Respondents reported rat infestation in one-third of the buildings in which they lived. Most recipients owned a clock, a television set and/or a radio, but only one in four had a telephone. The latter situation, the author points out, was related to Departmental policy limiting possession of a telephone by welfare families.

Continuous time on assistance was not reported. More than half of the families first received assistance in 1960 or thereafter. One-third first received assistance within two years prior to the time of the survey. Families without fathers in the home were more likely to have received assistance before 1960.

Women with husbands in the household were more likely to have been reared by both parents in rural communities and to have had less schooling. Unmarried women in their teens and twenties were more likely than married women of the same age to have grown up in New York City, to have graduated from high school, to have been reared by their mothers only and to have fewer children.

When those women who were separated from their husbands were asked how they felt, more than half replied that they were not at all concerned about being separated. Two-thirds of the unmarried mothers expressed some concern about not being married.

Concern about not being married	Separated mothers %	Unmarried mothers %
Very concerned	18	36
Moderately concerned	9	13
A little concerned	14	10
Not at all concerned	53	39
Don't know or no answer	6	1
Total	100	100

Family and Community Origins

About a fifth of the mothers on welfare were born in New York City, about a third in the South, and over a third in Puerto Rico. Three out of 10 mothers grew up in New York City; three in 10 came to the city before they were 10 years of age; another three in 10 arrived as young adults. Only 10 percent came to the city when they were over 20 years of age. Half of the mothers were reared in small town or rural areas. (Table 1)

Table 1. Community of rearing, by ethnicity

Community of Rearing	White	Negro	Puerto Rican
	%	%	%
New York City	78	33	8
Another city	12	21	30
Small town	6	21	23
Farm	3	26	38
Total	100	100	100
Number	(208)	(1017)	(964)



Half of the mothers on welfare were brought up by both parents. A fourth were raised by mothers only and a fourth by other relatives or in foster homes or institutions. Half of the mothers had four or more siblings.

Among the mothers in the sample, those under 30 years of age and those who grew up in an urban community were less likely to have been reared by both parents. Those born and/or reared in New York City were most likely to have been brought up by their mother only and to have had fewer siblings.

Fifteen percent of all mothers on welfare reported that their parents had received public assistance. Negroes reported that 21 percent of their parents had received assistance, whites, 16 percent and Puerto Ricans, 9 percent.

The Reports discuss some of the problems involved in defining intergenerational dependency and determining how extensive it is. Concern, it is pointed out, is usually focused only on those families receiving public support continuously for decades, overlooking the many siblings who are fully self-supporting. However, it is noted that families might receive assistance for a few weeks or months during periods of unemployment or illness, or for a few years until their children are in school. This raises a question as to whether such short-term assistance recipients are to be considered "dependent" along with the more chronic cases. Another factor to be considered is the variation in past and present State and local assistance programs. It is noted that such programs in the rural South and in Puerto Rico differ considerably from programs in the urban North. This helps to explain why respondents born and/or reared in New York City showed a greater tendency to indicate that their parents were on welfare than did those reared elsewhere and why Puerto Rican mothers were least likely to indicate that their parents were ever on welfare.

Education and Work Experience

Fifty-seven percent of the mothers on welfare had attended high school and one out of six were graduated. Another one out of six had not gone beyond the fourth grade of elementary school. Mothers with higher educational attainment were younger, more likely to be unmarried or separated and more likely to have been reared in New York City. Most mothers stated they did not get as much education as they wanted.

Eighty percent of the mothers had some employment experience. Usually this was prior to the birth of the first child but almost one-half of the mothers worked afterward. Three out of 10 had worked three years or less but almost one-half had worked six years or more. Three out of 10 were employed for more than 10 years. White mothers were more likely to have been employed as clerical workers, Negro mothers as operatives or service workers, and Puerto Rican as operatives.

The Reports comment on the implications of findings for planning work training and employment programs for welfare recipients. If the target population is to be younger women who have more education, an extensive day care program would be needed since these women are more likely to have preschool children. Overall planning must also take into account that training and employment of this group of women might be interrupted by pregnancy and care of the infant. More older women are probably available for employment since they are less likely to have preschool children. However, since their level of education is lower, basic education courses as well as vocational training would be required to enable them to improve earning capacity.

In terms of programs to upgrade recipients' skills and incomes, the observation is made that men should not be overlooked. Although employed and employable men constitute only about 5



percent of the recipients, their continued dependency directly affects probably 20 and possibly 25 percent of New York City's welfare population.

Attitude toward Welfare and Work

More than half of the mothers said they "felt bothered" about being on welfare and agreed with the statements on the questionnaire that "Getting money from welfare makes a person feel ashamed" and "People should be grateful for the money they get from welfare." The majority of respondents believed that many undeserving people were assisted by welfare and that the Department has the right to question the spending of money received. (Table 3)

Table 3. Selected attitudes of (a) all mothers on welfare and (b) respondent mothers, by ethnicity

	All mothers*	Respondent mothers		
		White	Negro	Puerto Rican
	%	%	%	%
Felt bothered by being on welfare.....	58	63	56	48
Agreed that people on welfare feel ashamed.....	56	61	55	53
Strongly agreed that people should be grateful for welfare money.....	61	50	53	76
Agreed that many undeserving people get welfare money.....	71	56	70	76
Agreed that the Department of Welfare has no right to question spending.....	44	42	44	44
Agreed that welfare workers made her feel that she should not bother them.....	36	32	41	29
Number.....		(208)	(1017)	(964)

*Weighted projections from stratified sample.

Seven out of 10 mothers said they would prefer to work rather than stay at home. Child care was the major reason given for wanting to stay at home. However, six out of 10 mothers with preschool children said they would prefer to work if appropriate day care facilities were available. (Table 3) The author cautions that a "stated preference on a survey should neither be equated with a decision to act accordingly nor a readiness to do so, although it may involve both."

Table 3. Preference for working or homemaking, assuming appropriate child day care arrangements, of mothers with preschool children, by ethnicity

Preference	Mothers with Preschool Children		
	White	Negro	Puerto Rican
	%	%	%
Prefer to work	38	69	54
Prefer to stay home	55	28	43
Don't know	6	2	2
No answer	1	2	2
Total	100	100	100
Number	(114)	(729)	(648)

Two-thirds of the mothers planned to work in the future although six in 10 said they still expected to be receiving public assistance the next year. Younger women, those with more schooling, and those with fewer children, were less likely to expect to remain publicly assisted. Eight out of 10 mothers on welfare believed that their children would not become dependent adults. Only 3 percent felt that their children surely or probably would require welfare assistance as adults.

The Preliminary Reports illustrate the usefulness of data about conditions and characteristics relative to receipt of public assistance. Even though the survey was not directly concerned with causes and solutions to the problems of dependency, the information obtained from recipients does broaden understanding of variations among welfare families and has implications for flexible program and policy planning.

IRENE COX
Division of Intramural Research
Social and Rehabilitation Service

Plaintiff's Exhibit "21" in Opposition to Defendants' Motions for Summary Judgment

Judgment of Alameda County Superior Court of the State of California in *McCullough* v. *Terzian*

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

No. 379011

MARY MCCULLOUGH, MELVIN MCCULLOUGH, MICHAEL JOHNSON and ROSALINE JOHNSON, by their Guardian Ad Litem MARY MCCULLOUGH, individually and on behalf of all persons receiving Public Assistance under the Categorical Aid Programs in the State of California,

Petitioners,

vs

HRAYR TERZIAN, Director of the Alameda County Welfare Department, JOHN MONTGOMERY, Director of the Department of Social Welfare of the State of California,

Respondents.

This matter came on for hearing before Department One of the above-entitled court, Honorable LEWIS E. LERCARA presiding, on April 25, 1968. Petitioners having filed their petition or writ of mandate and complaint for declaratory relief, appeared by DAVID NAWI of the Legal Aid Society of Alameda County. Respondent JOHN MONTGOMERY, Director of the State Department of Social Welfare, and HRAYR TERZIAN, Director of the Alameda County

Plaintiff's Exhibit "21"

Welfare Department, appeared by ELIZABETH PALMER, Deputy Attorney General and BEN H. ZUPPAN, Deputy County Counsel. A Stipulation of Facts having been filed, arguments having been presented and the matter having been submitted for decision, and the Court having made Findings of Fact and Conclusions of Law, which have been signed and filed,

IT IS ORDERED THAT:

A Peremptory Writ of Mandate shall issue from this Court commanding respondents JOHN MONTGOMERY, Director of the State Department of Social Welfare, and HRAYR TERZIAN, Director of the Alameda County Welfare Department, and each of them to set aside and reconsider their action withdrawing aid under the Aid to Families with Dependent Children (AFDC) program from petitioners MARY MCCULLOUGH, MELVIN MCCULLOUGH, MICHAEL JOHNSON and ROSALINE JOHNSON in light of this Court's Findings of Fact and Conclusions of Law and to:

1. Provide said petitioners with the assistance to which they are otherwise entitled without regard to any adjustment required by or based on the determination of the Alameda County Welfare Department that a man is or was living in the home of petitioners;

2. Provide the fair hearing and decision requested by said petitioners pursuant to the provisions of Section 10950 et seq. of the W & I Code within thirty days hereof;

3. Provide said aid as of April 1, 1968 and continue to provide said aid until such time that a determination if any of ineligibility is rendered pursuant to said hearing, provided that respondents may require petitioner MARY

Plaintiff's Exhibit "21"

McCULLOUGH to complete an affirmation of eligibility form CA-201 as a condition of the continuation of said payments.

IT IS DECLARED THAT:

Section 44-325 of the State Department of Social Welfare, Public Social Services Manual before and as amended effective April 1, 1968 is invalid because and to the extent that it does not provide a hearing with adequate procedural safeguards including a decision based solely on the evidence produced at the hearing and rendered by an impartial person or body not previously connected with the case, prior to the withdrawal or termination of public assistance benefits under the Aid to Families with Dependent Children, Old Age Security, Aid to Needy Disabled and Aid to Blind programs as required by State law and United States and California Constitutions.

IT IS FURTHER ORDERED THAT a peremptory writ of mandate shall issue from this court commanding respondent JOHN MONTGOMERY, Director of the State Department of Social Welfare to:

Restore or continue to provide the public assistance benefits to which recipients are otherwise entitled under the AFDC, Old Age Security, Aid to Disabled and Aid to Blind programs, whose benefits will be or have been terminated under said programs until a decision if any of ineligibility is rendered after a hearing provided by W & I Code section 10950 et seq. or the equivalent thereof;

Provided that no public assistance benefit under said programs may be terminated or withheld without the advance written notice required by Public Social Services Manual section 44-325.43;

Plaintiff's Exhibit "21"

Provided further that to be eligible for the relief afforded herein the affected recipients must file with the State Department of Social Welfare a request for a fair hearing provided by W & I Code section 10950 et seq. and that such recipients must file with the County Department administering aid a sworn statement in writing which controverts the essential allegations of ineligibility and which includes a statement of all current income and resources; the aid shall be restored from the date of filing of the request for fair hearing, or the date of filing the above-described statement with the County Department, whichever shall be later;

Provided further that any recipient whose aid has already been withheld or terminated prior to the date hereof and who has not received a fair hearing decision or who is eligible for a fair hearing under the law may file the statement above-described with the County Department and the request for fair hearing and thereupon shall be restored to aid as above provided.

LEWIS E. LERCARA
Judge of the Superior Court

Affidavit of Robert B. Keyes in Support of Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of Albany) ss.:
City of Albany)

ROBERT B. KEYES, being duly sworn, deposes and says:

1. That he is an attorney at law, admitted to practice before the Appellate Division, Second Department, in 1950, and admitted to practice before the United States District Court for the Southern and Eastern Districts of New York.

2. That he is an Associate Attorney in the New York State Department of Social Services, Office of Counsel, and that he was appointed to this position on May 25, 1967.

3. That he has been in charge of the Fair Hearing Section since sometime in August, 1967, and has been in charge of the Bureau of Public Assistance Laws, which includes the Fair Hearing Section since sometime in November, 1967, and that this Bureau is part of the Office of Counsel.

4. That immediately prior to his current position with the Department of Social Services, he was an Unemployment Insurance Referee in the New York State Department of Labor, and that he served in this position for eight years; and that prior thereto, and beginning with July 16, 1952, he served in successive periods of time as an attorney

with the New York State Rent Commission, as an attorney with the New York State Commission against Discrimination, and as a hearing officer with the New York State Banking Department.

5. That the following represents his best knowledge and information as to procedures, practices and organizational features of the State Department of Social Services relative to fair hearings, both past and present:

a) *Historical Perspective*

The fair hearing process, although of long standing in New York, played a minor role in traditional social welfare policy. There was no great activity in terms of annual intake of requests for fair hearing, and even less with respect to actual hearings held. In 1964 the total statewide intake was one hundred and eighty-eight cases, of which only fourteen were disposed of by decision after hearing. In 1965 the total statewide intake was one hundred and ninety-nine cases, of which only sixteen went through to decision. The balance of the case intake in those years was otherwise disposed of by abandonment, withdrawal or adjustment. During this period of time, the area offices of the State Department of Social Services which act as supervisory and administrative arms of the Department for specified regional areas throughout the State, and the Division of Family Services of the Department would attempt a resolution of the dispute by adjustment. Only after all efforts at adjustment had failed was the request finally referred to be scheduled for hearing. The procedures were paced in keeping with the accepted pattern of subordinating the fair hearing process to the adjustment process. As a consequence of this approach, it was not unusual for a request to be delayed from six to twelve months before it was even referred for scheduling

of the hearing. Such activity was comfortably handled by the casual assignment of personnel not primarily assigned to the fair hearing program.

The year 1966 represents an intermediate position in the evolution of the present system. In that year, six hundred and fifty requests for fair hearing were received and full hearings and decisions rose to twenty. This was the year in which Medicaid was enacted, and in August of that year, in anticipation of requests for hearing under the new Medical Assistance program, the first formally designated hearing officers, four in number, were appointed.

The year 1967 had two distinct phases. In the first phase, covered by the months of January through July, the monthly intake indicated a strong new surge of activity in fair hearings, only partially accounted for by Medicaid cases. A table of intake for those months shows:

Month	*Requests*
January	170
February	105
March	100
April	141
May	129
June	109
July	139

The second phase, and the beginning of an entirely new system began on August 16, 1967, when a single package of six hundred and forty-three requests for fair hearing were served on the Department, all demanding scheduling within the then prescribed time of sixty days. All of the appeals were from actions of the New York City Department of Social Services, and almost all related to disputes as to the adequacy of money grants in ADC cases. None of them related to issues of discontinuance. A second mass

filing of requests was made on November 1, 1967, numbering one thousand forty-five. A table of intake for the balance of 1967 shows:

August	906
September	443
October	435
November	1193
December	363
	4233 (total for entire year)

b) *Current Procedure and Practice*

When the new phase of fair hearings began in August, 1967, it was obvious that drastic revisions of procedure were needed. In addition, emergency action had to be taken with respect to the immediate handling of the new and unheard of caseload. In September, four new hearing officers were appointed on a temporary basis, by means of a temporary services fund appropriation, and a calendaring schedule was designed to handle fifty of the New York City adequacy issue cases a day, assigning ten cases per day to each of five hearing officers. The first day of hearings under the new calendaring schedule was September 14, 1967. Furthermore, arrangements were made to establish a new office in New York City for the purpose of handling hearings in that City. On December 14, 1967 the New York City office of the Fair Hearing Section was opened at 117 Liberty Street.

We are still in a state of flux with reference to establishing a definitive set of underlying procedures governing the processing of requests for fair hearing. This is in relation to purely internal departmental procedures, and not in relation to those procedures effected by the new Rules on Fair Hearings, promulgated by the State Board of Social Welfare and made effective March 1, 1968 (18 NYCRR 84.1 et seq.; defendant Wyman's exhibit B).

Affidavit of Robert B. Keyes

It has been the constant position of Counsel to the Department, Mr. Felix Infausto, that a key feature to any new procedure must be to get the requests for fair hearing into the Fair Hearing Section as soon as possible. Another key feature must be the disentanglement of the fair hearing process from the adjustment process and no longer subordinating the fair hearing procedure to the adjustment procedure. These objectives could only be realized on a piecemeal basis but will soon be fully achieved. At a meeting of Counsel and Deputy Commissioners of the Department divisions involved, held on June 14, 1968, it was agreed in broad outline, that all requests for fair hearing received by any area office of the Department would be forwarded directly to the Fair Hearing Section for scheduling, on date of receipt, and that any adjustment efforts that may still be feasible would not in any way interfere with or delay the fair hearing process. A formalized statement of the specific internal procedures effectuating these key features is now being prepared.

A great part of our current caseload is still caught up in the tailend of the former procedure. Some of the cases disposed of in May, 1968, had still been retained for varying periods of time, either in area offices or in the Division of Family Services. However, as of approximately the beginning of June, 1968, all requests received by the Division of Family Services from the area offices are referred, on the day of receipt or the following day, to the Fair Hearing Section. Hopefully, within a short time, there will be no leftover cases which will have been in any way affected by past procedures. It should also be noted, with respect to discontinuance cases, that since March 4, 1968, and pending a final and formalized new statement of internal procedure, an interim procedure was developed under which an area office would, upon receipt of a request for fair hearing, telephone the Fair Hearing Section and give sufficient information to permit the immediate sched-

uling of cases within the ten-day limit now prescribed by Section 84.6 of the Rules of the State Board of Social Welfare (18 NYCRR 84.6).

Another underlying internal procedure is the referral of all proposed decisions from the Fair Hearing Section to the Division of Family Services for concurrence. Again, as a matter of historical practice, there was normally a very extended delay before the proposed decision was returned for final preparation. Although there has been a marked acceleration in the period of time required for such concurrence, now usually about a week, it is the position of Counsel to the Department that such concurrence procedure should be eliminated and he is actively attempting to effect such elimination.

c) *Personnel*

(1) The Fair Hearing Section has eight hearing officers to cover the entire State. The case distribution throughout the State is such that it is almost a daily occurrence for a hearing officer to be sent to a particular area of the State for the purpose of handling only one hearing. This is almost unavoidable in view of the requirement of the State Board of Social Welfare that discontinuance cases be scheduled within ten working days from the date the request is received by the Department (18 NYCRR 84.6). Even in other type cases which are under a thirty-three day time limitation for scheduling of the hearing, a request for a fair hearing made in some small county or other type social services district which is involved in only a limited number of fair hearings cannot be held up pending an accumulation of cases from that district so that again a hearing officer must be assigned just to handle the one case in the course of a working day. In New York City there is a more economical use made of hearing officers because two or three hearing officers are assigned there on

a daily basis. The statewide calendars are prepared and the referees are fully scheduled over a month in advance. There is no available reserve in the event of any unforeseen emergency, such as the incapacity of a hearing officer or an unusually heavy intake of cases within a particular period of time. One of the hearing officers was incapacitated as the result of an automobile accident while en route to a hearing on May 21, 1968, and will not return to work before July 23, 1968. A plea is being made to the Department for additional hearing officers and the matter is now being given budgetary consideration. It is estimated that at least eight additional hearing officers are required. As of June 28, 1968, with a monthly intake of several hundred cases, eight hundred and sixty in May, 1968 and nine hundred and seventy in June, 1968 (including a projected intake for June 28), requests for hearings received on June 28, 1968, if relating to issues other than discontinuance, would be scheduled within the required thirty-three working day limit. With respect to requests filed on this same date, involving a discontinuance of assistance, the scheduling would be in accordance with the following:

> New York City—July 29—should be no later than July 15 (therefore nine working days behind)
>
> Outside of New York City—August 5—should be no later than July 15 (therefore fifteen working days behind)

(2) The Department had approved in its proposed supplemental budget the request for the creation of a senior hearing officer's position. This request was then turned down because of the limited supplemental appropriation made by the Legislature. A plea is now being made for the creation of such a position from temporary services funds. The appointment of a senior hearing officer, who can devote full time to supervision of the Fair Hearing

Section, would greatly expedite the entire fair hearing process, especially with reference to the review of draft decisions. At the present time the draft decisions can only be reviewed at irregular intervals by deponent, whose duties as supervisor of the entire Bureau of Public Assistance Laws prevent his devoting full time to the Fair Housing Section of such Bureau, either in terms of its general administration or in terms of the reviewing procedure.

(3) A plea is also being made for additional staff for the Fair Hearing Section, including attorneys and clerical help. These items had also been previously rejected because of the limited appropriation in the budget.

d) *Time lapse*

The federal requirement is that a request for hearing be processed and disposed of within sixty days from the date of the request for the hearing (Handbook of Public Assistance Administration, Part IV, 6200). Section 84.15 of the Rules of the State Board of Social Welfare (18 NYCRR 84.15) requires that a fair hearing decision be issued not later than twelve days from the close of the hearing. In the month of May, 1968, which was the first month in which such statistics were compiled, the time lapse with respect to the forty-seven cases in which decisions were issued in that month, measured from the day of the Department's receipt of the request for fair hearing to the date of issuance and mailing of decision, was as follows:

Time Lapse	*Number of Cases*
Over 90 days	35
Over 80 days	4
Over 70 days	3
Over 60 days	3
Over 50 days	2

e) *Adjournments*

An important factor in the time lapse picture is the problem of adjournments. In the month of May, 1968, there were eighty-seven adjournments out of seven hundred and fourteen scheduled cases. Generally, about seventy percent of the adjournments are at the request of the appellants. In the month of June, 1968 through the close of June 19, there were one hundred and fourteen adjournments of scheduled cases, of which sixty-eight were at the request of the appellants. The reason that the figures for this period of time, which is the first period for which we have such information, do not reflect the seventy percent of adjournments normally requested by appellants is that on June 7 twenty-five cases had to be adjourned by the Department itself because of the Memorial holiday for Senator Robert Kennedy. It should be noted that under the federal requirements, where the appellant requests an adjournment, "* * * such extra time may be added to the 60 days" (Handbook of Public Assistance Administration, Part IV-6300, item 3).

6. That attached herewith are copies of the monthly statistical reports for April, 1968 and May, 1968 prepared by Office of Counsel and submitted to the Commissioner of the State Department of Social Services. [The June report will be forwarded to the Attorney General as soon as it is completed, for submission to the Court.]

7. That during the twelve month period from April 1, 1967 to March 31, 1968, and with reference to discontinuance cases only, there were three hundred and seven requests for fair hearing, statewide, of which seventy-four were abandoned and ninety-one were withdrawn by the appellants. In that period there were eighty-nine decisions in which the discontinuance by the local social services

district was affirmed by the Department, and fifty-three decisions in which such determinations were reversed. In the current month of June, 1968 there have been seven decisions in discontinuance cases issued to date, in which four affirmed the discontinuance, one reversed and two remanded the case to the social services district for further consideration.

Robert B. Keyes

(Sworn to June 28, 1968.)

Exhibit to Keyes Affidavit

Fair Hearing Report for April 1968

(See Opposite ☞)

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

May 17, 1968

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF APRIL, 1968

	New York City		Upstate**	Totals
	Adequacy Issues	Other Issues*		
1. Matters on hand on March 31, 1968	883	48	275	1206
2. Requests for hearings in April, 1968	294	62	169	525
3. Total matters in office in April, 1968	1177	110	444	1731
4. Matters closed in April, 1968				
a) By decision	21	19	26	66
b) By withdrawal	102	25	155	282
c) By default	78	17	68	163
Totals	201	61	249	511
5. Total matters pending in office on April 30, 1968	976	49	195	1220
a) Decisions in process	74	18	39	131
b) Hearings scheduled	200	17	109	326
c) Hearings to be scheduled	109	0	6	115
d) Defaults*** and withdrawals in process of being confirmed	593	14	41	648
Totals	976	49	195	1220

* Discontinuance, suspension, failure to act, miscellaneous

** All issues

*** Neither appellant nor representative appear

Adequacy	New York City Issues	New York City Other Issues	Upstate	Totals
Calendar action in month of April, 1968				
a) Matters scheduled for hearing in April, 1968	207	132	150	489
b) Hearings held and completed	38	15	33	86
c) Hearings adjourned	54	59	33	146
d) Confirmed withdrawals	81	16	39	136
e) Unconfirmed withdrawals	12	3	21	36
f) Defaults	22	39	24	85
Totals	207	132	150	489
Special accommodation hearings for appellants who are unable to appear at regularly scheduled hearings because of employment or infirmity				
a) Night hearings	-	3	-	3
b) Hearings held in appellants' homes	2	2	3	7
c) Hearings held for appellants in hospitals	-	1	-	1
Totals	2	6	3	11

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF MAY, 1968

	New York City		Upstate**	Totals
	Adequacy Issues	Other Issues*		
Matters on hand on April 30, 1968	976	49	195	1220
Requests for hearings in May, 1968	357	198	305	860
Total matters in office in May, 1968	1333	247	500	2080
Matters closed in May, 1968				
a) By decision	26	9	12	47
b) By withdrawal	186	4	43	233
c) By default	90	11	42	143
Totals	302	24	97	423
Total matters pending in office on May 31, 1968	1031	223	403	1657
a) Decisions in process	96	51	87	234
b) Hearings scheduled	439	102	161	702
c) Hearings to be scheduled	69	3	88	160
d) Defaults*** and withdrawals in process of being confirmed	427	67	67	561
Totals	1031	223	403	1657

* Discontinuance, suspension, failure to act, miscellaneous
** All issues
*** Neither appellant nor representative appear



	New York City		Upstate	Totals
	Adequacy Issues	Other Issues		
6. Calendar action in month of May, 1968				
a) Matters scheduled for hearing in May, 1968	420	108	186	714
b) Hearings held and completed	34	13	38	85
c) Hearings adjourned	108	38	41	187
d) Confirmed withdrawals	126	16	55	197
e) Unconfirmed withdrawals	28	4	25	57
f) Defaults	124	37	24	185
g) Duplication	0	0	3	3
Totals	420	108	186	714
7. Special accommodation hearings for appellants who are unable to appear at regularly scheduled hearings because of employment or infirmity				
a) Night hearings	3	4		7
b) Hearings held in appellants' homes	1			1
c) Hearings held for appellants in hospitals	—	—	1	1
Totals	4	4	1	9



8. Disposition of matters by decision after Fair Hearing

a)	Affirmed	32
b)	Reversed	6
c)	Reversed in part	2
d)	Remand	5
e)	Miscellaneous	2
	Total	47

9. Time lapse of matters disposed of by decision after Fair Hearing*

Time Lapse	No. of Matters
Over 90 days	35
Over 80 days	4
Over 70 days	3
Over 60 days	3
Over 50 days	2
Total	47

10. Decisions without hearing 2

* Beginning with the day of Department's receipt of request for Fair Hearing.

Affidavit of Jack R. Goldberg in Support of Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JACK R. GOLDBERG, being duly sworn, deposes and says:

I am the Commissioner of Social Services of the City of New York and one of the defendants in this consolidated action. I submit this affidavit in compliance with the Court's request of June 26, 1968, to furnish such statistical data as may be available, reflecting the operation effects of our new review procedure no. 68-18 (exhibit 1 in my affidavit of June 14, 1968) which implements the State Department of Social Services' new Regulation [Section 351.26 (b)] effective April 26, 1968, providing for recipients a right to review in cases of intended discontinuance or suspension of public assistance, including the non-federally-aided Home Relief category.

At my direction, the Bureau of Public Assistance prepared and furnished me with a report of cases in which Form M-3C (Notice of Intent to Suspend or Discontinue Assistance) had been sent to clients since May 27, 1968, the date the procedure became operational. The report which covers the period May 27, 1968 to about July 1, 1968, is as follows:

Affidavit of Jack R. Goldberg

I. Number of notices (forms) #M3C) sent to clients since May 27, 1968 — 1094

II. Number of requests for review — 145

III. Time lapse between date of request for review and the date of the decision

One Day	33
Two Days	23
Three Days	13
Four Days	14
Five Days	16
Six Days	5
More Than Six Days	20

IV. Number sustained — 69
Number reversed — 55
Still pending — 21

Jack R. Goldberg, Ed.D

(Sworn to July 8, 1968.)

Affidavit of Merrill Charlton in Support of Defendants' Motions for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MERRILL CHARLTON, being duly sworn, deposes and says:

I am an assistant attorney in the Legal Division of the Department of Social Services of the City of New York. I submit this affidavit in compliance with this Court's request concerning matter involving retroactive payments to recipients to the dates when incorrect action suspending or discontinuing assistance grants was taken by the local agency, and the current status of the twelve proposed intervenors' cases in respect to their (state) fair hearings.

On June 29, 1968, I was advised by Mr. Joel Sachs, of Counsel to the Attorney General representing defendant George K. Wyman, that the State Department of Social Services has formally adopted a Regulation (352.5(6)) which conforms to the policy of the U.S. Department of Health, Education and Welfare, laid down in its Federal Handbook Transmittal No. 140 dated February 8, 1968, effective July 1, 1968, Part IV Sections 6200 (k) and 6300 (g) (see exhibit I in defendant Goldberg's brief of June 17, 1968) respecting payments to recipients retroactively to the date of their suspensions or discontinuances found to

have been incorrectly made by the local agency. Those sections read as follows:

"6200(κ) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, *the agency will make the corrected payments retroactively to the date the incorrect action was taken.*" (emphasis supplied)

"6300(g) * * *

Insofar as may be applicable, a decision in favor of the claimant *applies retroactively to the date the incorrect action was taken, and also applies prospectively.*" (emphasis supplied)

Formerly, under state regulation 352.5(5) two months retroactive payments were allowable. The City Department of Social Services invokes new procedures only when official notices thereof are duly received from the State. On July 2, 1968 I telephoned the office of Felix Infausto, Chief Counsel to the State Department of Social Services at Albany, in an effort to expedite official receipt of the new regulation (Sec. 352.5). Mr. Heffernan, of Mr. Infausto's office, later called and confirmed the State's new regulation which, in subdivision 6 thereof, states that when a fair hearing decision has ordered the correction of a discontinuance, the correction of a denial of an application for assistance or the correction of the amount of the assistance, a grant shall be made to cover the full amount to which the applicant or recipient was entitled in accordance with the decision for the entire period from the date the incorrect action was taken. (Exhibit A attached)

It should be noted that the foregoing is intended to include the Home Relief category although this class of assistance is not supported by the federal government. It thus clearly appears that such recipient is made whole in the event of erroneous discontinuance.

At the hearing before this Court on June 26, 1968, request was made for a brief summary of the status of the proposed intervenors' cases in respect to the (state) fair hearings. On July 3rd I checked with their files at our Fair Hearing Section, and report as follows:

As to Intervenor SIDOR, *Ina—ADC 7587871*

(residing at 32 Bassett Avenue, Brooklyn, N.Y.C.)

Assistance in this case was supended on February 16, 1968 on the ground that she owned about $14,000.00 worth of stock in Dreyfus Mutual Funds and about $3,000 worth of stock in the American Accident and Health Insurance Company; she transferred ostensible title in said stock to her mother, but the latter holds it for her (intervenor's) interest. She also transferred her ownership of a 1965 model automobile to her mother for the same purpose. The Department's contention was and is that Ina Sidor is not in need and is ineligible for public assistance. Intervenor demanded a (state) fair hearing on or about March 4, 1968; the hearing was held March 28, 1968, resulting in a decision against claimant and upholding the suspension because of her interests in the aforesaid stock and automobile. The new Procedure 68-18 did not apply. She is not a genuinely aggrieved person.

Affidavit of Merrill Charlton

As to Intervenor SOTO, *Antonio—HR 2195227*

(residing at 2688 Broadway, N.Y.C.)

Case closed June 13, 1968 for refusing to stop using grants for drugs and refusing to cooperate in that he would not continue to attend the Department's Drug Addiction Rehabilitation Center since May 23, 1968. On or about June 20, 1968, intervenor demanded a state fair hearing, but in review under new Procedure 68-18, intervenor's case was reopened and on July 1, 1968 he was given $27.50 for food and other needs and on July 2, 1968 he was given $40.00 to pay an employment agency fee for getting him a job as a machine operator with the J. K. Metal Company located at Northern Boulevard, Queens, N.Y.C.; additionally, he was given $59.30 for food, shelter and clothing. The (state) fair hearing is scheduled for July 9, 1968. He is not a genuinely aggrieved person.

As to Intervenor HOLMES, *Mary—ADC 2615689*

(residing at 11½ West 102nd Street, N.Y.C.)

Case closed June 4, 1968 on ground that she refused to explain what she did with a $278.00 grant to cover payment of her rent, broker's fee and security for another apartment she failed to move to. She also refused to return the money. All this followed mailing to her a letter of intent to discontinue assistance on May 27, 1968 pursuant to new Procedure 68-18. She did not respond to said letter but on June 12, 1968 she demanded a (state) fair hearing which was scheduled for July 2, 1968. However, on June 18, 1968 her case was reopened and she was given an emergency check for $39.80 for food, etc., covering period from June 18th to June 21, 1968, and on June 22, 1968 she was given an emergency check of $74.10 for food, etc., covering period from June 22 to June 30, 1968. On July

1, 1968 she was restored to the rolls at the rate of $113.90 semi-monthly. On July 2, 1968 her fair hearing was discontinued because of her default. This intervenor is not a genuinely aggrieved person.

As to Intervenor FUENTES, *Maria—ADC 1611464*

(residing at 911 F D R Drive, N.Y.C.)

On March 5, 1968 this intervenor was notified that she would receive no more grants after her March 15, 1968 check. Pending implementation by the City of the State's Regulation 351.26 effective March 1, 1968 (subsequently replaced by new 351.26 effective April 26, 1968), she and her attorney were told that her grants would continue uninterruptedly if she promptly demanded a (state) fair hearing, until a decision was reached. However, on March 15, 1968 she was reinstated and when her fair hearing was reached on March 29, 1968, the decision rendered held that there was no issue to be tried since her public assistance never was effectively discontinued. This intervenor is not a genuinely aggrieved person.

As to Intervenor GOMEZ, *Felix—HR 2629891*

(residing at 606 East 13th Street, N.Y.C.)

On April 11, 1968, this case was closed because Intervenor requested it, claiming that he contributes $60.00 weekly to the home and daughter Hilda contributes $40.00 weekly, and there was no need to furnish public assistance grants to his wife, Confessor. The facts disclosed a budget semi-monthly excess of $75.32. Shortly thereafter, because of a change in the family's circumstances, intervenor was restored to the welfare rolls. On May 1, 1968 intervenor's attorney requested that (state) fair hearing (demanded previously) be adjourned. On May 23, 1968 intervenor's

attorney, Marilyn Ann Rosenfield (of M F Y) requested withdrawal of the demand for fair hearing on the conceded ground that intervenor was restored to assistance and no issues existed for trial. Admittedly, intervenor is not a genuinely aggrieved person.

As to Intervenor NEGRON, *Theresa—ADC 2063084*

(residing at 1473 Hoe Avenue, Bronx, N.Y.)

This case was suspended May 31, 1968 but on or about June 1, 1968 she was given a grant of $156.00 for food, clothing and other. On June 19, 1968 the suspension was fully lifted and she is receiving recurrent grants. This intervenor is not a genuinely aggrieved person.

As to Intervenor VELEZ, *Angela—ADC 2302327*

(residing at 351 Broadway, Brooklyn, N.Y.C.)

By letter of March 20, 1968 this intervenor was notified that her case was being closed after it was determined that her husband returned to the home, resumed living there with her and contributed support. She demanded a (state) fair hearing on or about March 25, 1968 although she had already received her assistance grant through March 31, 1968. The fair hearing based on this closing of the case was scheduled for April 9, 1968. It appears that this intervenor earlier demanded a (state) fair hearing on grounds of not having been brought up to required minimum standards of assistance, and this hearing was scheduled for April 18, 1968. Previous to April 9, 1968 intervenor was notified that both fair hearings would be heard together on April 18, 1968. Thereafter, hearings were held and finally concluded June 17, 1968. Awaiting decision.

Affidavit of Merrill Charlton

As to Intervenor FULLER, *Cynthia—TADC 1444994*

(residing at 2508 Clarendon Road, Brooklyn, N.Y.C.)

This intervenor was advised that her case would be suspended, and if need be, closed, if she continued to refuse acceptance of two job offers made on December 19th and December 22, 1967, by the Division of Employment Rehabilitation. Her case was suspended on December 26, 1967 and closed December 29, 1967 for such refusals. Intervenor promptly demanded a (state) fair hearing which was scheduled for January 23, 1968. On that date, as a result of a discussion off the record among the hearing officer and both sides, the hearing was adjourned. It was tried on February 13, 1968 all afternoon but not concluded and adjourned. On March 15, 1968 it was adjourned again. On April 15, 1968 the case remained unfinished and went over to May 2, 1968 when again it was tried but unfinished. On May 28, 1968 the trial hearing was resumed and concluded and decision is now awaited. It should be noted that through the course of these trial hearings, other issues, as grounds for closing, came to light, namely, removal of rent from her budget because she could not show an obligation to pay rent, and also that she was living with a single daughter in the same one-family house, and the question of home ownership involved.

As to Intervenor COLDBURN, *Alma—ADC 2543778*

(residing at 521 Thatford Road, Brooklyn, N.Y.C.)

This case was closed on March 7, 1968 when her young son Freddy disclosed that intervenor owned a 1965 Impala Chevrolet automobile and refused to account therefor along with ownership of (small) checking account in the Grantland Avenue and Eastern Parkway, Brooklyn branch of the Manufacturers Hanover Bank Trust Company, as well as refusal to disclose what contributions for home maintenance were being made by a Mr. Julius Carter living

there with her all in violation of the Department's resource policy. While intervenor earlier demanded a (state) fair hearing for inadequacy of grants on November 21, 1967 and thereafter tried without completion, and adjourned from time to time because she was receiving hospital care, she demanded a (state) fair hearing on the case closing on March 13, 1967. This latter hearing was unfinished on March 28, 1968 and again unfinished on April 30, 1968, but on May 27, 1968 it was concluded and a decision is awaited.

As to Intervenor MULEI, *Magdalena—ADC 1864859*

(residing at 144 West 119th Street, N.Y.C.)

While in this case there was a suspension on March 11, 1968 because a stepfather-adoptive parent entered the family household and was able to meet the family's needs, this intervenor still received her full grant due March 16, 1968. A (state) fair hearing was demanded. There was no interruption of her recurrent assistance and in view of this full reinstatement the hearing officer, on April 18, 1968 ruled there was no issue to be tried. Thereafter, intervenor's assistance was discontinued and a (state) fair hearing was demanded and is presently scheduled for trial July 29, 1968.

As to Intervenor PAVEY, *Leroy—HR 2603359*

(residing at 227 Bowery, N.Y.C.)

On January 25, 1968 this intervenor's assistance was discontinued. Intervenor was living at a place ruled by the State Department of Social Services as a temporary shelter (flop-house) for which no assistance was allowable. However, he was offered reinstatement to the rolls if he would accept better and healthier living quarters as permanent accommodations offered to him by the Department. He refused. A (state) fair hearing was demanded January 30, 1968, and tried March 25, 1968. A decision is awaited.

Affidavit of Merrill Charlton

As to Intervenor RODRIGUEZ *Minerva—ADC 2384398*

(residing at 586 Prospect Avenue, Bronx, N.Y.C.)

This case was closed May 22, 1968 through error, although intervenor already had received her usual check for assistance due May 16, 1968 to meet her needs through May 31, 1968. Her case was reopened and reinstated on June 13, 1968 and she has been receiving her recurrent assistance regularly ever since to the present time, as follows: On June 13, 1968 she was given a grant of $95.55 in cash for food and rent to cover the period June 1st through June 16, 1968; on the same day, she was also given a follow up check in the sum of $115.35 for food and rent to cover the period June 16th through June 30, 1968; and on July 3, 1968 she was given cash in the sum of $115.35 to cover the period from July 1st through July 15th, 1968. Thus, intervenor has received all assistance sums constituting her full recurrent grants back to the date of closing. No fair hearing ever was demanded. Since she has been made whole and fully reinstated, she is not a genuinely aggrieved person.

In the interest of completeness, I should like to inform the Court, on the advice of Joel Sachs, Esq., that recently the Governor signed into law (Chapter 998 of Laws of 1968) a bill providing for allowable emergency assistance payments for thirty (30) days in ADC cases.

Merrill Charlton

(Sworn to July 5, 1968.)

Exhibit to Charlton Affidavit

Amendment of §352.5 of Title 18, NYCRR

(See Opposite ☞)

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

Pursuant to the provisions of sections 20 and 34 of the Social Services Law, I, George K. Wyman, Commissioner of Social Services, do hereby amend in part, as hereinafter indicated, section 352.5 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR, effective as of July 1, 1968.

Subparagraph (v) of paragraph (5) of subdivision (n) of section 352.5 is hereby REVOKED.

Paragraphs (6) and (7) of subdivision (n) of section 352.5 are hereby renumbered to be paragraphs (7) and (8) thereof.

Subdivision (n) of section 352.5 is hereby amended by adding thereto a new paragraph to be paragraph (6) to read as follows:

(6) When a fair hearing decision has ordered the correction of a discontinuance, the correction of a denial of an application for assistance, or the correction of the amount of assistance, a grant shall be made to cover the full amount to which the applicant or recipient was entitled in accordance with the decision for the entire period from the date the incorrect action was taken.

Dated: June 28, 1968

Signed:_____
COMMISSIONER

This is to certify that this is the original of an order of the State Department of Social Services, made on June 28, 1968, amending in part, section 352.5 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18, NYCRR.

Dated: June 28, 1968

Signed:_____
COMMISSIONER

Affidavit of John J. Loflin in Support of Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOHN J. LOFLIN, being duly sworn, deposes and says:

I am an Assistant Corporation Counsel in the office of J. Lee Rankin, attorney for defendant, Jack R. Goldberg, in the above entitled actions.

During the course of oral argument on June 26, 1968 the Judges asked questions concerning the practices relating to termination of benefits in certain federal agencies. Information concerning these practices could not be supplied to the Court at that time. With respect to proceedings within the Social Security Administration I respectfully refer the Court to Title 20, Chapter 3 of the Code of Federal Regulations, Sub-part "J", Sections 404.901 *et seq.*

With respect to the provisions for termination of benefits under the Railroad Unemployment Insurance Act I

respectfully refer the Court to Title 20, Code of Federal Regulations, Chapter 2, Sections 320.1 *et seq.*

It would appear that the procedures referred to, copies of which are annexed hereto and marked respectively Exhibits "A" and "B", are most similar to the procedures challenged in this case concerning the termination of public assistance.

John J. Loflin

(Sworn to July 8, 1968.)

Exhibit to Loflin Affidavit

Federal Procedures

(See Opposite ☞)

Subpart J—Procedures, Payment of Benefits, and Representation of Parties

AUTHORITY NOTE: The provisions of this Subpart J issued under sec. 206, 53 Stat. 1372, as amended, sec. 221, 68 Stat. 1081, as amended; 42 U.S.C. 406, 421, 1302, 1395, et. seq., unless otherwise noted.

SOURCE: The provisions of this Subpart J appear at 25 F.R. 1677, Feb. 26, 1960, unless otherwise noted.

§ 404.901 Procedures, entitlement to benefits, payment of benefits, and representation of parties.

The provisions contained in this Subpart J govern the procedures for determining and reviewing whether an individual meets the requirements for entitlement to, and the amount and payment of, monthly benefits (including special payments at age 72 under sec. 228 of the Act) and lump sums; determining and reviewing whether an individual meets

the requirements for entitlement to hospital insurance benefits and supplementary medical insurance benefits, and for determining and reviewing rights with respect to establishment and continuance of a period of disability and the revision of earnings records. The provisions of this Subpart J also govern the procedures for representation of parties in these matters.

[31 F.R. 16765, Dec. 31, 1966]

§ 404.902 Initial and reconsidered determinations of the Social Security Administration.

An initial determination (see §§ 404.905 through 404.908) or a reconsidered determination (see §§ 404.909 through 404.916) of the Social Security Administration is made by that component of the Social Security Administration, other than the Bureau of Hearings and Appeals or the Bureau of Federal Credit Unions, which has jurisdiction over the particular title II (Old-Age, Survivors, and Disability Insurance Benefits) or title XVIII (Hospital and Supplementary Medical Insurance Benefits) proceedings resulting in the determination.

[31 F.R. 16765, Dec. 31, 1966]

§ 404.904 Joint payments to a family.

(a) *Two or more beneficiaries in same family.* Where an amount is payable under title II of the Act for any month to two or more individuals who are members of the same family, the Administration may, in its discretion, certify any two or more of such individuals for joint payment of the total benefits payable to them for such month.

(b) *Joint payee dies before negotiation of check.* Where a check has been issued for joint payment of the total benefits payable to two or more beneficiaries and one of such beneficiaries dies before the check has been negotiated the Administration may, if the check represents payment for the month of death or for the month preceding the month of death, authorize the surviving payee beneficiary or beneficiaries to negotiate the check. Such beneficiary or beneficiaries will be authorized to negotiate only one such check except where the Administration finds that this restriction will result in undue hardship. Such authorization shall be made by the placement on the face of the check of a stamped legend signed by an official of the Administration redesignating the survivor or survivors as the payee of the check. (See 31 CFR 360.4.) Where the unnegotiated check represents benefits for a month after the month of death or for a month before the month preceding the month of death, negotiation of such check by the surviving payee or payees will not be authorized.

(c) *Adjustment or recovery of overpayment.* Where a check representing payment of the total benefits payable for a month to two or more beneficiaries is negotiated by the surviving payee or payees pursuant to authorization under paragraph (b) of this section and where the amount of the check exceeds the amount to which the surviving payee or payees are entitled for such month, appropriate adjustment or recovery, with respect to such excess amount, shall be made in accordance with section 204(a) of the Act.

(Sec. 5 of Reorg. Plan. No. 1 of 1953, 67 Stat. 18, 631) [31 F.R. 3394, Mar. 4, 1966]

§ 404.905 Administrative actions that are initial determinations.

(a) *Entitlement to monthly benefits, lump sums, hospital insurance benefits, and supplementary medical insurance benefits.* The Administration shall make findings, setting forth the pertinent facts and conclusions, and an initial determination with respect to the entitlement to monthly benefits (including special payments at age 72) or a lump sum under title II of the Act, or entitlement to hospital insurance benefits or supplementary medical insurance benefits under title XVIII of the Act, of any party to the determination who has filed an application for such entitlement. In the case of monthly benefits or a lump sum, the determination shall include the amount, if any, to which the party is entitled and, where applicable, such amount as reduced or increased pursuant to sections 202(j)(1), 202(k)(3), 202(m), 202(q), 203(a), 203(b), 203(c), 203(f), 203(g), 204(a), 222(b), 223, section 224 of the Act before its repeal in 1958, or section 224 of the Act as enacted on July 30, 1965 (sec. 335 of P.L. 89-97) or section 228 of the Act.

(b) *Modification of the amount of monthly benefits or lump sum.* The Administration shall, under the circumstances hereafter stated in this paragraph, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether:

(1) An individual or, where appropriate, his survivor may obtain a recom-

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putation or recalculation of the individual's primary insurance amount (see sec. 215(f) of the Act) and, if so, the amount thereof; or

(2) Benefits to which an individual is entitled should be paid under sections 202(k) (2), (3), or (4) of the Act and, if so, the amount thereof; or

(3) There should be a reduction under section 203(a) of the Act, or section 224 of the Act before its repeal in 1958, or section 224 of the Act as enacted on July 30, 1965, or deduction under section 203 (b), (c), (d), (f), (g), (h)(2), section 222(b), or reduction or suspension under section 228 of the Act with respect to benefits to which an individual is entitled, because of circumstances existing at or after such entitlement, and, if a reduction or deduction is to be made, the amount thereof; or

(4) There has been an overpayment or underpayment of monthly benefits or a lump sum and, if so, the amount thereof, and the adjustment under section 204(a) or section 204(d) of the Act, to be made by increasing or decreasing the monthly benefits or lump sum to which an individual is entitled; or

(5) There should be a suspension of monthly benefits to an individual entitled to disability insurance benefits by reason of blindness, for months in which it is found the individual engaged in substantial gainful activity, under section 223(a)(1) of the Act.

(c) *Establishment of a period of disability.* The Administration (after any determination as to the existence of disability by the appropriate State agency which may be made under a Federal-State agreement pursuant to section 221 (b) of the act) shall make findings, setting forth the pertinent facts and conclusions, and an initial determination with respect to the entitlement to a period of disability of any party who has filed an application for a period of disability. The determination shall include the date such period of disability begins.

(d) *Termination of monthly benefits or periods of disability.* The Administration (or, in a disability claim, a State agency when required by a Federal-State agreement pursuant to section 221(b) of the Act) shall, with respect to a party who has been determined to be entitled to monthly benefits, or a period of disability, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether, under the applicable provisions of title II of the Act, such party's entitlement to monthly benefits, or a period of disability, has ended and, if so, the last month of such entitlement or period of disability. Such findings of fact and determination shall be made whenever it appears to the Administration that such party's entitlement to monthly benefits, or a period of disability, has ended. The suspension of benefits pursuant to section 202(t) of the Act shall be considered to be a termination thereof for purposes of this section.

(e) *Reinstatement of benefits.* The Administration shall, with respect to an individual whose benefits have been determined to have ended under paragraph (d) of this section, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether the individual is entitled to a reinstatement of the benefits thus ended and, if so, the effective date of such reinstatement. Such findings of fact and determination shall be made whenever a party makes a written request for reinstatement or whenever evidence is received which justifies such reinstatement.

(f) *Support of husband, widower, or parent.* The Administration shall make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether a husband, widower, or parent meets the requirements of support from the insured individual as set forth in the pertinent provisions of section 202 of the Act. Also, whether the evidence of support was submitted to the Administration within the time limits set forth in the Act or under the provisions described in § 404.612 or § 404.617.

(g) *Revision of an earnings record.* When a request for the revision or further revision of an individual's earnings record is filed in accordance with § 404.805 or § 404.806, and § 404.810, the Administration shall make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether the Administration's record of such individual's wages or self-employment income should be revised, either by changing the records as to the amount or the time of payment of wages or self-employment income or by entering or deleting items of wages or self-employment income. Any determination that an earnings record shall be revised shall specify the amount of any increase or

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decrease to be made, the amount of any item to be included or deleted, and the period or periods to which earnings are to be credited on the record.

(h) *Applicant's failure to submit evidence.* If an individual fails to submit evidence in support of his application for monthly benefits, a lump sum, for entitlement to hospital insurance benefits or supplementary medical insurance benefits, or for a period of disability, as may be requested by the Administration pursuant to any provision of the Act or Subpart H of this part, the Administration may make an initial determination disallowing the individual's claim. The initial determination, however, shall specify the conditions of entitlement that the applicant has failed to establish because of his failure to submit the requested evidence.

(i) *Underpayment due an individual now deceased.* When there is an underpayment of monthly benefits or a lump sum due an individual now deceased, the Administration shall make findings and an initial determination as to whether the underpayment resulted from error, the amount of the underpayment, and the party to whom the underpayment should be paid pursuant to section 204 of the Act and §§ 404.501 and 404.503.

(j) *Withdrawal of applications and requests for revision of records of earnings.* When a request for withdrawal of an application, or for withdrawal of request for revision of records of earnings is denied by the Administration (see § 404.615), the Administration shall make findings, setting forth the pertinent facts and conclusions, and an initial determination of denial.

(k) *Cancellation of request for withdrawal.* When a request for cancellation of a "request for withdrawal" of an application or of a request for revision of records of earnings is denied by the Administration (see § 404.615a), the Administration shall make findings, setting forth the pertinent facts and conclusions, and an initial determination of denial.

(l) *Termination of entitlement to hospital and supplementary medical insurance benefits*—(1) *Hospital insurance benefits.* The Administration, shall, with respect to a party who has been determined to be entitled to hospital insurance benefits, make findings, setting forth the pertinent facts and conclusions and an initial determination as to whether under the applicable provisions of title II and title XVIII of the Act, such individual's entitlement to hospital insurance benefits has ended and, if so, the last month of such entitlement.

(2) *Supplementary medical insurance benefits.* The Administration shall, with respect to a party who has been determined to be entitled to supplementary medical insurance benefits, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether under section 1838 (b)(2) of the Act, such individual's entitlement to supplementary medical insurance benefits has been terminated because of nonpayment of premiums.

(m) *Waiver of adjustment or recovery of monthly benefits, a lump sum, hospital insurance benefits, or supplementary medical insurance benefits.* The Administration shall make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether, under sections 204(b) or 1870(c) of the Act, there shall be no adjustment or recovery where an overpayment (including a payment under sec. 1814(e) of the Act) with respect to an individual has been made.

(Secs. 202, 216, 223, 49 Stat. 623, as amended, 53 Stat. 1368, as amended, 68 Stat. 1080 as amended, 70 Stat. 815, as amended, 49 Stat. 647, as amended; sec. 5 of Reorganization Plan No. 1 of 1953, 67 Stat. 18; 42 U.S.C. 402, 416, and 423) [25 F.R. 1677, Feb. 26, 1960, as amended at 27 F.R. 1166, Feb. 8, 1962; 28 F.R. 14492, Dec. 31, 1963; 31 F.R. 16765, Dec. 31, 1966]

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J include, but are not limited to, the following:

(a) The suspension of benefits pursuant to section 203(g)(3) of the act (see § 404.425) pending investigation and determination of any factual issue as to the applicability of a deduction or deductions under section 203(b) of the act (see § 404.408).

(b) The suspension of benefits pursuant to section 225 of the act pending investigation and determination as to the cessation of the disability of an individual entitled to benefits under section 202(d) or 223 of the act.

(c) The appointment or continuance of a representative payee for and on behalf of a beneficiary under Title II of the act (see § 404.1601).

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(d) The certification of any two or more individuals of the same family for joint payment of the total benefits payable to such individuals (see § 404.904).

(e) The withholding by the Administration in any month, for the purpose of recouping an overpayment, of less than the full amount of the monthly benefit otherwise payable in that month (see § 404.502).

[25 F.R. 1677, Feb. 26, 1960, as amended at 25 F.R. 2127, Mar. 15, 1960; 25 F.R. 9469, Oct. 4, 1960; 27 F.R. 4513, May 11, 1962; 28 F.R. 14492, Dec. 31, 1963]

§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910) unless such determination is to the effect that a deduction, or, except in disability claims, a termination, is to be made and such determination is based only upon facts reported to the Administration by the party to the determination. Notice of termination because of cessation of disability shall inform the party to the determination of the right to reconsideration, even where the termination was based on a report to the Administration by the party to the determination that his condition improved or that he returned to work.

[31 F.R. 16763, Dec. 31, 1966]

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905(g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

[31 F.R. 16766, Dec. 31, 1966]

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§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this Part 404) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board, within 6 months from the date of mailing notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953.

[25 F.R. 6468, July 9, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.912 Parties to the reconsideration.

The parties to the reconsideration shall be the person who was the party to the initial determination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ 404.913 Notice of reconsideration.

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the basis therefor and inform the parties of their right to a hearing (see § 404.917).

§ 404.916 Effect of reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956.

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905, if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.918 Time and place of filing request.

The request for hearing shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines, or with a hearing examiner, or the Appeals Council, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this part) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing a hearing with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board. The request for hearing must be filed within 6 months after the date of mailing notice of the reconsidered

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determination to such individual, except where the time is extended as provided in § 404.612 or § 404.954.
[25 F.R. 6468, July 9, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.919 Parties to a hearing.

The parties to a hearing shall be the person or persons who were parties to the initial determination in question and the reconsideration. Any other individual may be made a party if such individual's rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital insurance benefits or supplementary medical insurance benefits may be prejudiced by the decision, upon notice given to him by the hearing examiner to appear at the hearing or otherwise present such evidence and contentions as to fact or law as he may desire in support of his interest.
[31 F.R. 16766, Dec. 31, 1966]

§ 404.920 Additional parties to the hearing.

The following individuals, in addition to those named in § 404.919, may also be parties to the hearing. Unless the hearing is with respect to the revision of an earnings record established and maintained by the Administration, a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that such individual's rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital insurance benefits or supplementary medical insurance benefits may be prejudices by any decision that may be made, may be a party to the hearing. Where the hearing is with respect to the revision of an individual's earnings record, a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate, may after his death, be made a party to the hearing upon filing a written notice of his or her desire to be a party.
[31 F.R. 16766, Dec. 31, 1966]

§ 404.921 Hearing examiner.

The hearing provided for in this Subpart J shall, except as herein provided, be conducted by a hearing examiner designated by the Director of the Bureau of Hearings and Appeals or his delegate. In an appropriate case, the Director may designate another hearing examiner or a member or members of the Appeals Council to conduct a hearing, in which case the provisions of this Subpart J governing the conduct of a hearing by a hearing examiner shall be applicable thereto.
[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 1037, Feb. 2, 1963]

§ 404.922 Disqualification of hearing examiner.

No hearing examiner shall conduct a hearing in a case in which he is prejudiced or partial with respect to any party, or where he has any interest in the matter pending for decision before him. Notice of any objection which a party may have to the hearing examiner who will conduct the hearing, shall be made by such party at his earliest opportunity. The hearing examiner shall consider such objection and shall, in his discretion, either proceed with the hearing or withdraw. If the hearing examiner withdraws, another hearing examiner shall be designated by the Director of the Bureau of Hearings and Appeals or his delegate to conduct the hearing. If the hearing examiner does not withdraw, the objecting party may, after the hearing, present his objections to the Appeals Council, as provided in §§ 404.945–404.949, as reasons why the hearing examiner's decision should be revised or a new hearing held before another hearing examiner.
[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 1037, Feb. 2, 1963]

§ 404.923 Time and place of hearing.

The hearing examiner shall fix a time and place for the hearing, written notice of which, unless waived by a party, shall, not less than 10 days prior to such time, be mailed to the parties at their last known addresses, or given to them by personal service. Written notice of the objections of any party to the time and place fixed for a hearing shall be filed by the objecting party with the hearing examiner at the earliest practicable opportunity. The notice shall state the reasons for the party's objection and his choice as to the time and place for the hearing. The hearing examiner may, for good cause, fix a new time and/or place for the hearing.

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§ 404.924 Hearing on new issues.

At any time after a request for hearing has been made, as provided in § 404.918, but prior to the mailing of notice of the decision, the hearing examiner may, in his discretion, either on the application of a party or his own motion, in addition to the matters brought before him by the request for hearing, give notice that he will also consider any specified new issue (see § 404.905) whether pertinent to the same or a related matter, and whether arising subsequent to the request for hearing, which may affect the rights of such party even though the Administration has not made an initial and reconsidered determination with respect to such new issue: *Provided*, That notice of the time and place of the hearing on any new issue shall, unless waived, be given to the parties within the time and manner specified in § 404.923: *And provided further*, That the claim is not one within the jurisdiction of a State agency under a Federal-State agreement pursuant to section 221(b) of the act. Upon the giving of such notice, the hearing examiner shall, except as otherwise provided, proceed to hearing on such new issue in the same manner as he would on an issue on which an initial and reconsidered determination has been made by the Administration and a hearing requested with respect thereto by a party entitled to such hearing.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.925 Change of time and place for hearing.

The hearing examiner may change the time and place for the hearing, either on his own motion or for good cause shown by a party. The hearing examiner may adjourn or postpone the hearing, or he may reopen the hearing for the receipt of additional evidence at any time prior to the mailing of notice to the party of the decision in the case. Reasonable notice shall be given to the parties of any change in the time or place of hearing or of an adjournment or a reopening of the hearing.

§ 404.926 Subpoenas.

When reasonably necessary for the full presentation of a case, a hearing examiner or a member of the Appeals Council, may, either upon his own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents which are relevant and material to any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall, not less than 5 days prior to the time fixed for the hearing, file with the hearing examiner or at a district office of the Administration a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof with sufficient particularity to permit such witnesses or documents to be found. The request for a subpoena shall state the pertinent facts which the party expects to establish by such witness or document and whether such facts could be established by other evidence without the use of a subpoena. Subpoenas, as provided for above, shall be issued in the name of the Secretary of Health, Education, and Welfare, and the Social Security Administration shall pay the cost of the issuance and the fees and mileage of any witness so subpoenaed, as provided in section 205(d) of the act.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.927 Conduct of hearing.

Hearings shall be open to the parties and to such other persons as the hearing examiner deems necessary and proper. The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the hearing examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing examiner may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the hearing examiner and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

§ 404.928 Evidence.

Evidence may be received at the hearing even though inadmissible under rules of evidence applicable to court procedure, subject to the provisions of the regulations in this Subpart J limiting the time within which the Administra-

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tion's earnings records may be revised and limiting their use as evidence (see §§ 404.804–404.806).

§ 404.929 Witnesses.

Witnesses at the hearing shall testify under oath or affirmation, unless they are excused by the hearing examiner for cause. The hearing examiner may examine the witnesses and shall allow the parties or their representatives to do so. If the hearing examiner conducts the examination of a witness, he may allow the parties to suggest matters as to which they desire the witness to be questioned, and the hearing examiner shall question the witness with respect to such matters if they are relevant and material to any issue pending for decision before him.

§ 404.930 Oral argument and written allegations.

The parties, upon their request, shall be allowed a reasonable time for the presentation of oral argument or for the filing of briefs or other written statements of allegations as to facts or law. Where there is more than one party to the hearing, copies of any brief or other written statement shall be filed in sufficient number that they may be made available to any party.

§ 404.931 Record of hearing.

A complete record of the proceedings at the hearing shall be made. The record shall be transcribed in any case which is certified to the Appeals Council without decision by the hearing examiner (see §§ 404.939 and 404.942 to 404.944, inclusive), in any case where a civil action is commenced against the Secretary (see § 404.951), or in any other case when directed by the hearing examiner or the Appeals Council.

§ 404.932 Joint hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters in issue at each such hearing, the hearing examiner may fix the same time and place for each hearing and conduct all such hearings jointly. Where joint hearings are held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

§ 404.933 Consolidated issues.

When one or more additional issues are raised by the hearing examiner pursuant to § 404.924, such issues may, in the discretion of the hearing examiner, be consolidated for hearing and decision with other issues pending before him upon the same request for a hearing, whether or not the same or substantially similar evidence is relevant and material to the matters in issue. A single decision may be made upon all such issues.

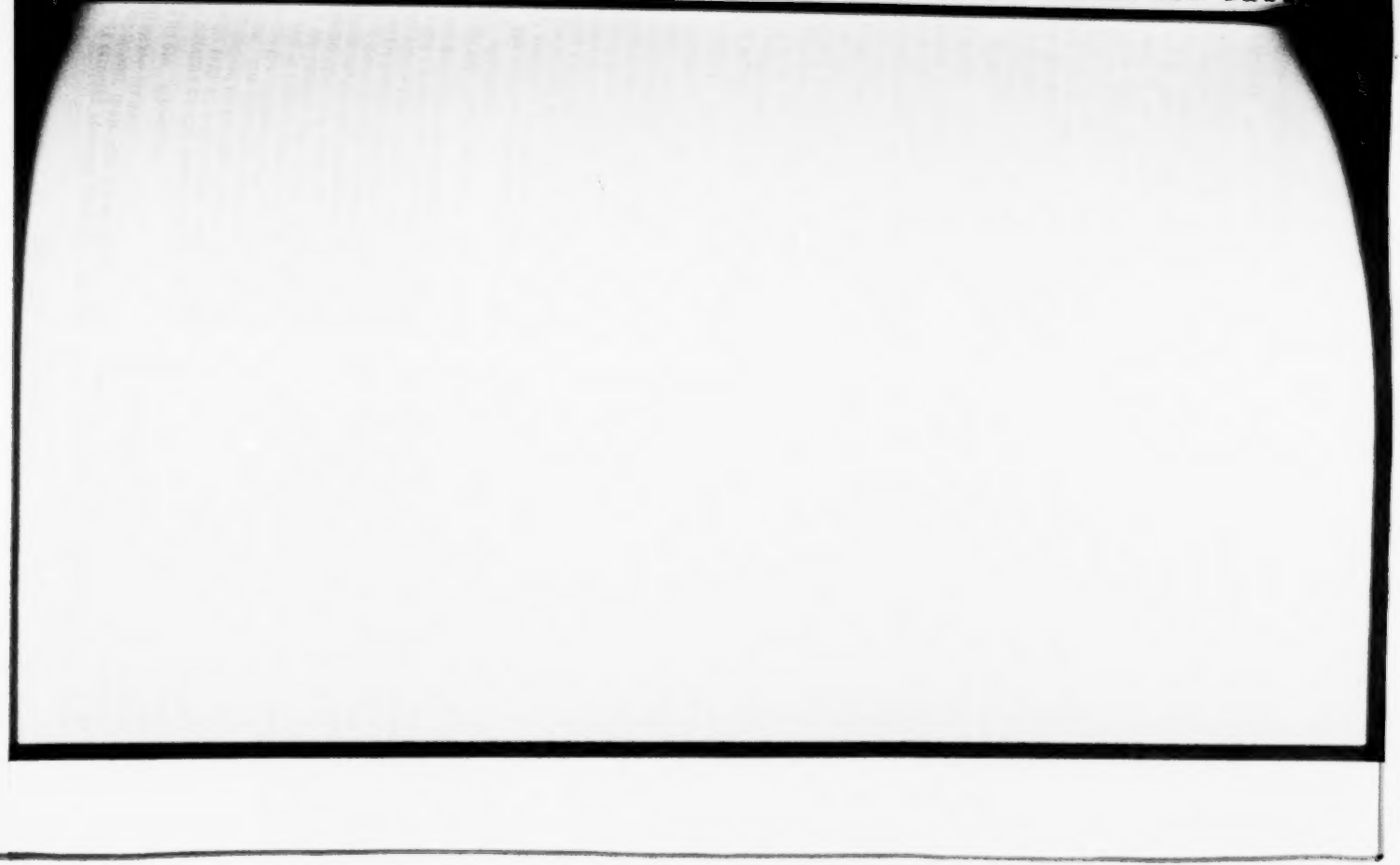
§ 404.934 Waiver of right to appear and present evidence.

If all parties waive their right to appear before the hearing examiner and present evidence and contentions personally or by representative, it shall not be necessary for the hearing examiner to give notice of and conduct an oral hearing as provided in §§ 404.923 to 404.933, inclusive. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the hearing examiner. Such waiver may be withdrawn by a party at any time prior to the mailing of notice of the decision in the case. Even though all of the parties have filed a waiver of the right to appear and present evidence and contentions at a hearing before the hearing examiner, the hearing examiner may, nevertheless, give notice of a time and place and conduct a hearing as provided in §§ 404.923 to 404.933, inclusive, if he believes that the personal appearance and testimony of the party or parties would assist him to ascertain the facts in issue in the case. Where such a waiver has been filed by all parties, and they do not appear before the hearing examiner personally or by representative, the hearing examiner shall make a record of the relevant written evidence, including applications, written statements, certificates, affidavits, reports, and other documents which were considered in connection with the initial determination and reconsideration, and whatever additional relevant and material evidence the party or parties may present in writing for consideration by the hearing examiner. Such documents shall be considered as all of the evidence in the case and the decision, as provided for in § 404.939, shall be based on them.

§ 404.935 Dismissal of request for hearing; by application of party.

With the approval of the hearing examiner at any time prior to the mailing of notice of the decision, a request for a

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hearing may be withdrawn or dismissed upon the application of the party or parties filing the request for such hearing. A party may request a dismissal by filing a written notice of such request with the hearing examiner or orally stating such request at the hearing.

§ 404.936 Dismissal by abandonment of party.

With the approval of the hearing examiner, a request for hearing may also be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor his representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he nor his representative can appear or (b) within 10 days after the mailing of a notice to him by the hearing examiner to show cause, such party does not show good cause for such failure to appear and failure to notify the hearing examiner prior to the time fixed for hearing that he cannot appear.

§ 404.937 Dismissal for cause.

The hearing examiner may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:

(a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision (see §§ 404.911, 404.918, 404.946, and 404.951).

(b) *No right to hearing.* Where the party requesting a hearing is not a proper party under section 205(b) of the act or does not otherwise have a right to a hearing under § 404.905 or § 404.917. This would include, but is not limited to, an individual claiming as a representative payee appointed pursuant to § 404.1601 (see § 404.906).

(c) *Hearing request not timely filed.* Where the party has failed to file a hearing request timely pursuant to § 404.918 and the time for filing such request has not been extended as provided in § 404.612 or § 404.954.

(d) *Death of party.* Where the party who filed the hearing request dies and there is no information before the hearing examiner or the Administration showing that an individual who is not a party may be prejudiced by the Administration's determination which is the subject of the request for hearing; provided, that if, within 6 months from the date of mailing notice of the Administration's reconsidered determination to the original party or within 3 months from the date notice of such dismissal is mailed to the original party at his last known address, whichever is later, any such other individual states in writing that he desires a hearing on such claim and shows that he may be prejudiced by the Administration's initial determination, then the dismissal of the request for hearing shall be vacated.

[25 F.R. 1677, Feb. 26, 1960, as amended at 27 F.R. 4513, May 11, 1962; 28 F.R. 14492, Dec. 31, 1963]

§ 404.937a Notice of dismissal and right to request review thereon.

Notice of the hearing examiner's dismissal action shall be given to the parties or mailed to them at their last known addresses. Such notice shall advise the parties of their right to request review of the dismissal action by the Appeals Council (see § 404.945).

§ 404.937b Effect of dismissal.

The dismissal of a request for hearing shall be final and binding unless vacated (see § 404.938).

§ 404.938 Vacation of dismissal of request for hearing.

A hearing examiner or the Appeals Council may, on request of the party and for good cause shown, vacate any dismissal of a request for hearing at any time within 6 months from the date of mailing notice of the dismissal to the party requesting the hearing at his last known address. In any case where a hearing examiner has dismissed the hearing request, the Appeals Council may, on its own motion, within 60 days after the mailing of such notice, review such dismissal and may, in its discretion, vacate such dismissal.

§ 404.939 Hearing examiner's decision or certification to Appeals Council.

As soon as practicable after the close of a hearing, the hearing examiner, except as herein provided, shall make a decision in the case or certify the case

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with a recommended decision to the Appeals Council for decision (see §§ 404.942–404.944). If the hearing examiner makes a decision in the case, such decision shall be based upon the evidence adduced at the hearing (§§ 404.923 to 404.933, inclusive) or otherwise included in the hearing record (see § 404.934). The decision shall be made in writing and contain findings of fact and a statement of reasons. A copy of the decision shall be mailed to the parties at their last known addresses.

§ 404.940 Effect of hearing examiner's decision.

The hearing examiner's decision, provided for in § 404.939, shall be final and binding upon all parties to the hearing unless it is reviewed by the Appeals Council (see §§ 404.948–404.950) or unless it is revised in accordance with § 404.956. If a party's request for review of the hearing examiner's decision is denied (see § 404.947) or is dismissed (see § 404.952), such decision shall be final and binding upon all parties to the hearing unless a civil action is filed in a district court of the United States, as is provided in section 205(g) of the act, or unless the decision is revised in accordance with § 404.956.

§ 404.941 Removal of hearing to Appeals Council.

The Appeals Council on its own motion may remove to itself any request for hearing pending before a hearing examiner. The hearing on any matter so removed to the Appeals Council shall be conducted in accordance with the requirements of §§ 404.924 to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

§ 404.942 Appeals Council proceedings on certification and review. Procedure before Appeals Council on certification by the hearing examiner.

When a case has been certified to the Appeals Council by a hearing examiner without decision (see § 404.939), the Appeals Council shall mail notice of such action to the parties at their last known addresses. Copies or a statement of the contents of the documents or other written evidence received in evidence in the hearing record, and a copy of the transcript of oral evidence adduced at the hearing, if any, or a condensed statement thereof, shall be made available to any party upon request, upon payment of the cost, or if such cost is not readily determinable, the estimated amount thereof, unless, for good cause shown, such payment is waived. When a case has been certified to the Appeals Council by a hearing examiner for decision, the parties shall be given, upon their request, a reasonable opportunity to appear before the Appeals Council for the purpose of presenting oral argument. The parties shall also be given, upon their request, a reasonable opportunity to file briefs or other written statements of their allegations as to applicable fact and law. Where there is more than one party, copies of such brief or written statements shall be filed in sufficient number that they may be made available to any party requesting a copy or any other party designated by the Appeals Council.

[25 F.R. 5181, June 10, 1960]

§ 404.943 Evidence in proceeding before Appeals Council.

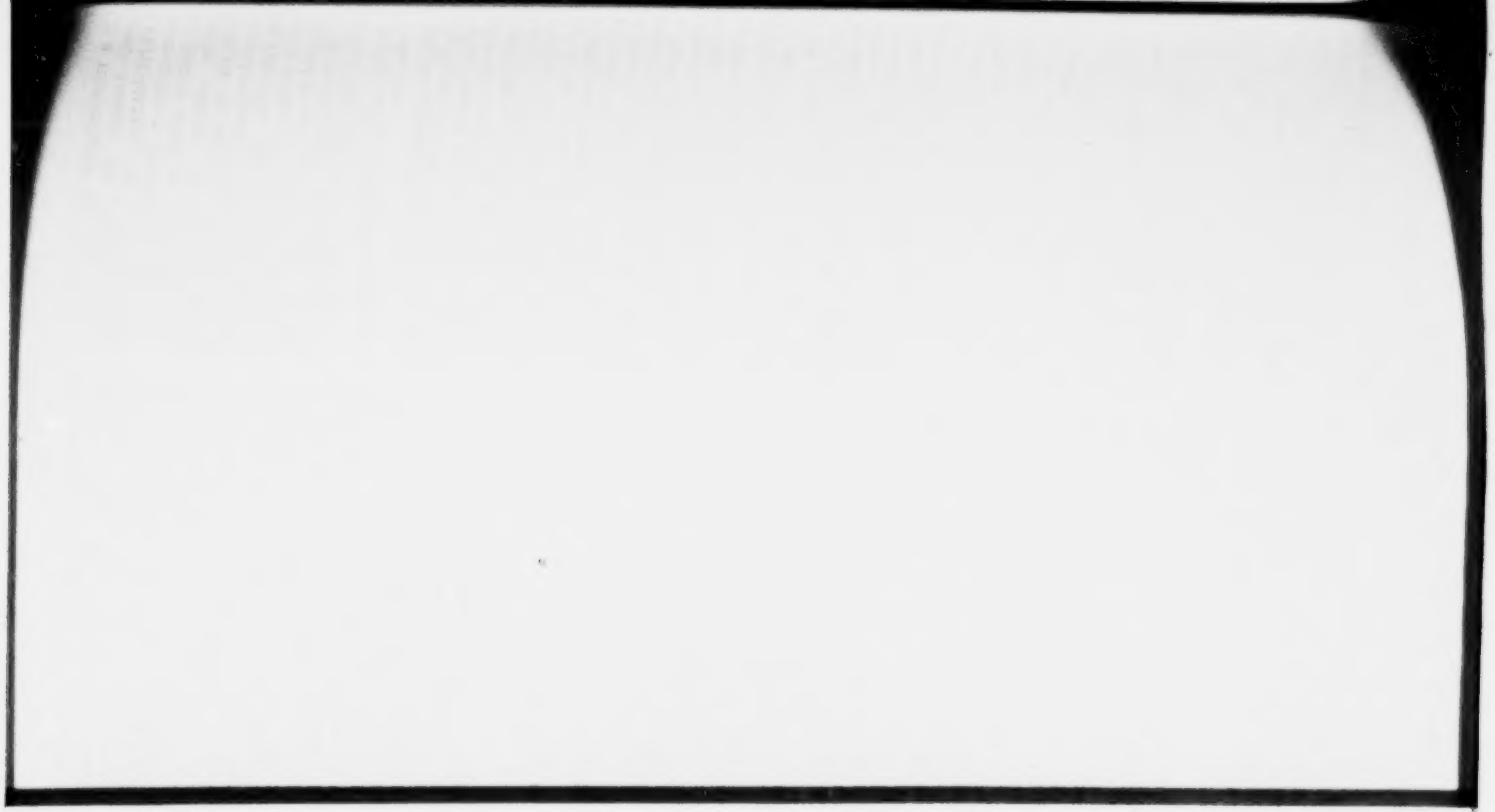
Evidence in addition to that admitted into the hearing record by the hearing examiner may not be received as evidence except where it appears to the Appeals Council that such additional evidence may affect its decision. If no additional material is presented but such evidence is available and may affect its decision, the Appeals Council shall receive such evidence or designate a hearing examiner or member of the Appeals Council before whom the evidence shall be introduced. Before such additional evidence is received, notice that evidence will be received with respect to certain matters shall be mailed to the parties, unless such notice is waived, at their last known addresses, and the parties shall be given a reasonable opportunity to present evidence which is relevant and material to such matters. When the additional evidence is presented to a hearing examiner or a member of the Appeals Council, a transcript or a condensed statement of such evidence shall be made available to any party upon request upon payment of the cost, or if such cost is not readily determinable, the estimated amount thereof, unless, for good cause shown, such payment is waived.

[25 F.R. 5181, June 10, 1960]

§ 404.944 Decision of Appeals Council.

The decision of the Appeals Council, when a case has been certified to it by a hearing examiner along with his recommended decision, shall be made in accordance with the provisions of § 404.950,

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§ 404.915 Right to request review of hearing examiner's decision or dismissal.

If a hearing examiner has made a decision, as provided in § 404.939, or dismissed a request for hearing, as provided in §§ 404.935 through 404.937, any party thereto may request the Appeals Council to review such decision or dismissal.

§ 404.916 Time and place of filing request.

The request for review shall be made in writing and filed with an office of the Administration, or in the case of an individual in the Philippines, with the Veterans' Administration Regional Office in the Philippines, or with a hearing examiner, or the Appeals Council, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this part) or an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing review with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board. Such request shall be accompanied by whatever documents or other evidence the party desires the Appeals Council to consider in its review. The request for review must be filed within 60 days from the date of mailing notice of the hearing examiner's decision or dismissal, except as provided in § 404.612 or § 404.554.

[25 F.R. 6468, July 9, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.917 Action by Appeals Council on review.

The Appeals Council may dismiss (see § 404.952) or, in its discretion, deny or grant a party's request for review of a hearing examiner's decision, or may, on its own motion, within 90 days from the date of mailing notice of such decision, reopen such decision for review or for the purpose of dismissing the party's request for hearing for any reason for which it could have been dismissed by the hearing examiner (see §§ 404.935 through 404.937). Notice of the action by the Appeals Council shall be mailed to the party at his last known address.

§ 404.918 Procedure before Appeals Council on review.

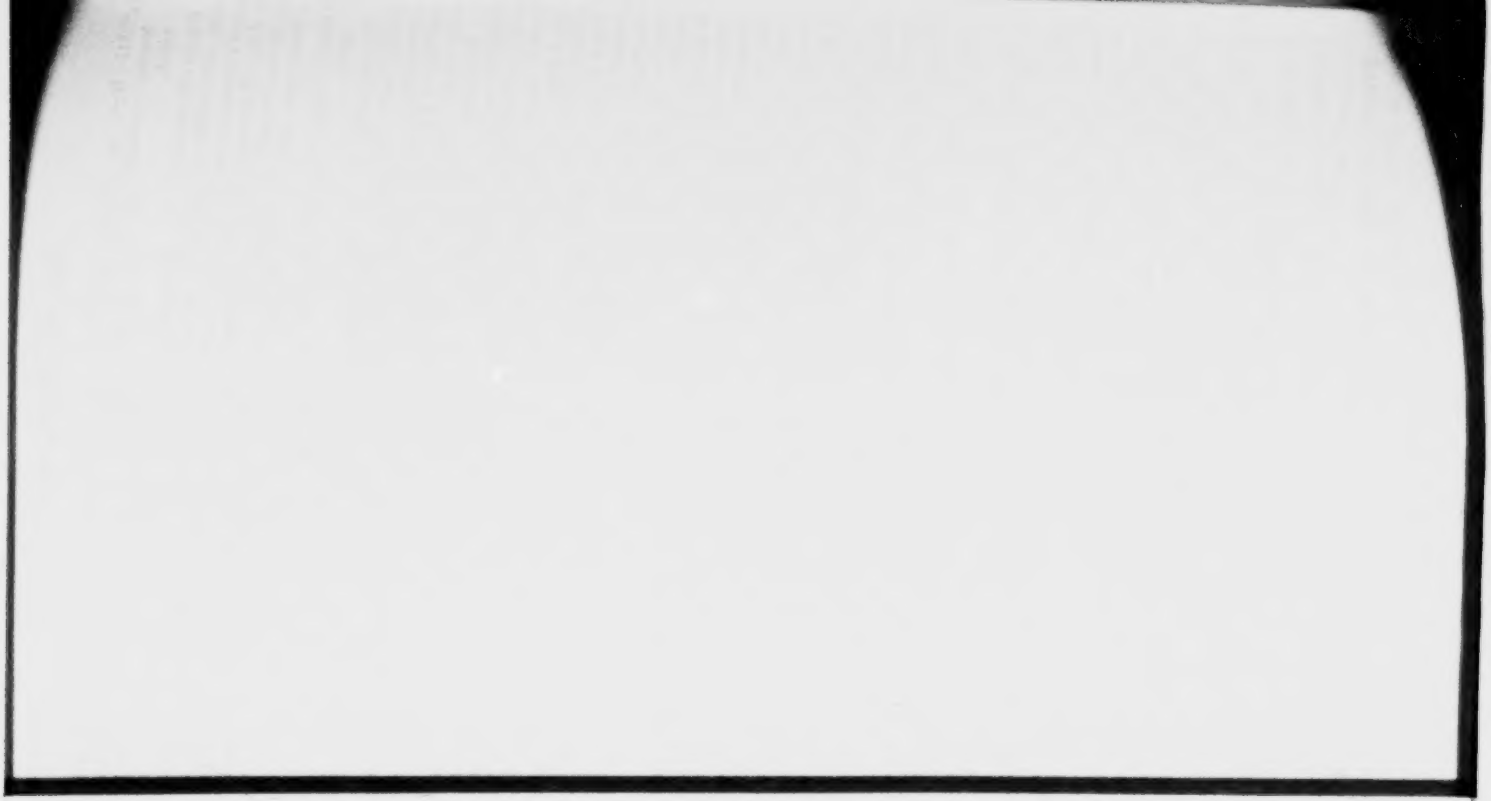
Whenever the Appeals Council determines to review a hearing examiner's decision (except when the case is remanded to a hearing examiner in accordance with § 404.950), the Appeals Council shall make available to any party upon request, copies or a statement of the contents of the documents or other written evidence upon which the hearing examiner's decision was based, and a copy of the transcript of oral evidence, if any, or a condensed statement thereof, upon payment of the cost, or if such cost is not readily determinable, the estimated amount thereof, unless for good cause shown, such payment is waived. The parties shall be given, upon request, a reasonable opportunity to file briefs or other written statements of allegations as to fact and law. Copies of such brief or other written statements, where there is more than one party, shall be filed in sufficient number that they may be made available to any party requesting a copy and to any other party designated by the Appeals Council.

[25 F.R. 5181, June 10, 1960]

§ 404.949 Evidence admissible on review.

Evidence in addition to that introduced at the hearing before the hearing examiner, or the documents before the hearing examiner where such hearing was waived (see § 404.934), may not be admitted except where it appears to the Appeals Council that such evidence is relevant and material to an issue before it and thus may affect its decision. Where no such evidence is presented, and it appears to the Appeals Council that additional material evidence is available which may affect its decision, the Appeals Council shall receive such evidence and designate a hearing examiner or member of the Appeals Council before whom the evidence shall be introduced. Before additional evidence is admitted into the record, as provided in this section, notice that evidence will be received with respect to certain issues shall be mailed to the parties, unless such notice is waived, at their last known addresses, and the parties shall be given a reasonable opportunity to comment thereon and to present evidence which is relevant and material to such issues. When the additional evidence is presented to a hearing examiner or a member of the Appeals Council, a transcript or a condensed statement of such evidence shall be made available to any party upon request, upon payment of the cost, or if such cost is not readily deter-

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minable the estimated amount thereof, unless, for good cause shown, such payment is waived.

[25 F.R. 5181, June 10, 1960]

§ 404.950 Decision by Appeals Council or remanding of case.

If a case is certified to the Appeals Council by a hearing examiner (see § 404.939), the Appeals Council shall make a decision. If the Appeals Council decides to review a hearing examiner's decision as provided in § 404.947, the Appeals Council may either make a decision in such case or remand the case to a hearing examiner for hearing and decision in accordance with the provisions of §§ 404.919 to 404.940, inclusive, which decision may be further reviewed as provided in this Subpart J. The decision of the Appeals Council, where the case is not remanded to a hearing examiner, shall be based upon the evidence received into the hearing record and such further evidence as the Appeals Council may receive, as provided in §§ 404.942, 404.943, 404.948, and 404.949. This decision shall be made in writing and contain findings of fact, and a statement of reasons. A copy of the decision shall be mailed to the parties at their last known addresses.

§ 404.951 Effect of Appeals Council's decision or refusal to review.

The Appeals Council may deny a party's request for review or it may grant review and either affirm or reverse the hearing examiner's decision. The decision of the Appeals Council, or the decision of the hearing examiner where the request for review of such decision is denied (see § 404.947), shall be final and binding upon all parties to the hearing unless a civil action is filed in a district court of the United States under the provisions of section 205(g) or section 1869 (b) of the Act, or unless the decision is revised under the provisions described in § 404.956.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.952 Dismissal by Appeals Council.

The Appeals Council may dismiss a request for review or proceedings pending before it under any of the following circumstances:

(a) *Upon request of party.* Proceedings pending before the Appeals Council may, with the approval of the Appeals Council, be discontinued and dismissed upon written application of the party or parties who filed the request for review to withdraw such request.

(b) *Death of party.* Proceedings before the Appeals Council, whether on request for review or review on the motion of the Appeals Council, may be dismissed upon the death of a party only if the record affirmatively shows that there is no prejudiced individual who wishes to continue the action.

(c) *Request for review not timely filed.* A request for review of a decision by a hearing examiner shall be dismissed where the party has failed to file a request for review within the time specified in § 404.946 and the time for filing such request has not been extended as provided in § 404.612 or § 404.954.

§ 404.953 Extension of time to request reconsideration.

If a party to an initial determination desires to file a request for reconsideration after the time for filing such request has passed (see § 404.911), such party may file a petition with the Administration for an extension of time for the filing of such request. Such petition shall be in writing and shall state the reasons why the request for reconsideration was not filed within the required time. For good cause shown, the component of the Social Security Administration which has jurisdiction over the proceedings (see § 404.902) may extend the time for filing the request for reconsideration. An extension, however, may not be granted where the sole purpose of the request is to seek revision of an individual's earnings record or a finding as to wages or self-employment income after revision is precluded by the provisions of section 205(c) (4) or (5) of the Act (see §§ 404.804 and 404.806). Where in a proper case the time for filing a request for reconsideration has been extended in accordance with the provisions of this section, no revision of an individual's earnings record or of a finding as to wages or self-employment income may be made except as is otherwise provided in this Subpart J.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.954 Extension of time to request hearing or review or begin civil action.

(a) *In general.* Any party to a reconsidered determination, a decision of a hearing examiner, or a decision of the Appeals Council (resulting from an initial determination as described in § 404.905), may petition for an extension of time for filing a request for hearing



or review or for commencing a civil action in a district court, although the time for filing such request or commencing such action (see §§ 404.918 and 404.936 and section 205(g) of the Act) has passed. If an extension of the time fixed by § 404.918 for requesting a hearing before a hearing examiner is sought, the petition may be filed with a hearing examiner. In any other case, the petition shall be filed with the Appeals Council. The petition shall be in writing and shall state the reasons why the request or action was not filed within the required time. For good cause shown, a hearing examiner or the Appeals Council, as the case may be, may extend the time for filing such request or action. An extension, however, may not be granted where the sole purpose of the request is to seek revision of an individual's earnings record or a finding as to wages or self-employment income after revision is precluded by the provisions of section 205(c) (4) or (5) of the Act (see §§ 404.804 and 404.806). Where a hearing examiner or the Appeals Council in a proper case has extended the time for filing such request or action, no revision of an individual's earnings record or of a finding as to wages or self-employment income may be made except as is otherwise provided in this Subpart J.

(b) *Where civil action commenced against wrong defendant.* If a party to a decision of the Appeals Council, or to a decision of the hearing examiner where the request for review of such decision is denied (see § 404.947), timely commences a civil action in a district court as provided by section 205(g) of the act, but names as defendant the United States or any agency, officer, or employee thereof instead of the Secretary either by name or by official title, and causes process to be served in such action as required by the Federal Rules of Civil Procedure, the Social Security Administration shall mail to such party notice that he has named the incorrect defendant in such action; and the time within which such party may commence the civil action pursuant to section 205(g) against the Secretary shall be deemed to be extended to and including the 60th day following the date of mailing of such notice.

[29 F.R. 8209, June 30, 1964 as amended at 31 F.R. 16767, Dec. 31, 1966. Correction noted at 32 F.R. 75, Jan. 6 1967]

§ 404.955 Review by Appeals Council.

Where a hearing examiner has determined the matter of extending the time for filing such request (whether he has allowed or denied the request for such extension), the Appeals Council on its own motion may review such determination and either affirm or reverse it. In connection with this review, the Appeals Council may consider whatever additional evidence relevant to this request a party may wish to present.

§ 404.956 Revision for error or other reason; time limitation generally.

(a) *Initial or reconsidered determination.* Except as otherwise provided in §§ 404.960 and 404.960a, an initial or reconsidered determination (see §§ 404.905 and 404.914) may be revised by the appropriate unit of the Social Security Administration having jurisdiction over the proceedings (§ 404.902), on its own motion or upon the petition of any party for a reason, and within the time period, prescribed in § 404.957.

(b) *Decision of a hearing examiner or the Appeals Council.* Either upon the motion of the hearing examiner or the Appeals Council, as the case may be, or upon the petition of any party to a hearing, except as otherwise provided in §§ 404.960 and 404.960a, any decision of a hearing examiner provided for in § 404.939 may be revised by such hearing examiner, or by another hearing examiner if the hearing examiner who issued the decision is unavailable, or by the Appeals Council for a reason and within the time period prescribed in § 404.957. Any decision of the Appeals Council provided for in § 404.950, may be revised by the Appeals Council for a reason and within the time period prescribed in § 404.957. For the purposes of this paragraph (b), a hearing examiner shall be considered to be unavailable if, among other circumstances, such hearing examiner has died, terminated his employment, is on leave of absence, has had a transfer of official station, or is unable to conduct a hearing because of illness.

[28 F.R. 14492, Dec. 31, 1963]

§ 404.957 Reopening initial or reconsidered determinations of the Administration, and decisions of a hearing examiner or the Appeals Council; finality of determinations and decisions.

An initial or reconsidered determination of the Administration or a decision

of a hearing examiner or of the Appeals Council which is otherwise final under § 404.908, § 404.916, § 404.940, or § 404.951 may be reopened:

(a) Within 12 months from the date of the notice of the initial determination (see § 404.907), to the party to such determination, or

(b) After such 12-month period, but within 4 years after the date of the notice of the initial determination (see § 404.907) to the party to such determination, upon a finding of good cause for reopening such determination or decision, or

(c) At any time, when:

(1) Such initial or reconsidered determination or decision was procured by fraud or similar fault of the claimant or some other person; or

(2) An adverse claim has been filed against the same earnings account; or

(3) An individual previously determined to be dead, and on whose account entitlement of a party was established, is later found to be alive; or

(4) The death of the individual on whose account a party's claim was denied for lack of proof of death is established by reason of his unexplained absence from his residence for a period of 7 years (see § 404.705); or

(5) The Railroad Retirement Board, pursuant to the Railroad Retirement Act, has awarded duplicate benefits on the same earnings account; or

(6) The initial or reconsidered determination or decision (for purposes of entitlement under title II or Part A and Part B of title XVIII, or for the amount of benefits under title II) either:

(i) Denies the individual on whose earnings account such benefit claim is based gratuitous wage credits for World War II or post-World War II military or naval service because another Federal Government agency (other than the Veterans' Administration) has erroneously certified that it has awarded benefits based on such service; or

(ii) Credits the earnings account of the individual on which such benefit claim is based with such gratuitous wage credits and another agency of the Federal Government (other than the Veterans' Administration) thereafter certifies that it has awarded a benefit based on the period of service for which such wage credits were granted.

(7) Such initial or reconsidered determination or decision was that the claimant did not have the necessary quarters of coverage for an insured status but thereafter earnings were credited to his account, pursuant to section 205(c)(5)(C), (D), or (G) of the act, which would have given him an insured status at the time of such determination or decision if such earnings had been credited to his account then.

(8) Such initial or reconsidered determination or decision is unfavorable, in whole or in part, to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963; 31 F.R. 16767, Dec. 31, 1966]

§ 404.958 Good cause for reopening a determination or decision.

"Good cause" shall be deemed to exist where:

(a) New and material evidence is furnished after notice to the party to the initial determination;

(b) A clerical error has been made in the computation or recomputation of benefits;

(c) There is an error as to such determination or decision on the face of the evidence on which such determination or decision is based.

§ 404.959 Finality of initial determinations or decisions on revision of earnings records.

Notwithstanding the provisions in § 404.957, a determination of the Administration or decision of a hearing examiner or the Appeals Council on a revision of an earnings record (see § 404.905(g)) may be reopened only within the time period and subject to the conditions provided in section 205(c)(4) or (5) of the act, or within 6 months after the date of notice to the party to such determination or decision, whichever is later.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.959a Finality of suspension of benefit payments for entire taxable year because of earnings.

Notwithstanding the provisions in § 404.957, a suspension of benefit payments for an entire taxable year because of earnings therein, may be reopened only within the time period and subject to the conditions provided in section 203(g)(1)(B) of the act, as amended in 1958.

§ 404.960 Time limitation for revising finding as to earnings.

No determination of the Administration or decision of a hearing examiner or the Appeals Council shall be revised after the expiration of the normal period for requesting reconsideration, hearing or review, or commencing a civil action with respect to such determination or decision (see §§ 404.911, 404.918, 404.946, and 404.951) to correct a finding as to wages or self-employment income, unless the correction of such finding is permitted under section 205(c) (4) or (5) of the act (see §§ 404.804–404.806).

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.960a Time limitation for revising finding suspending benefit payments for entire taxable year because of earnings.

No determination of the Administration or decision of a hearing examiner or the Appeals Council shall be revised after the expiration of the normal period for requesting reconsideration, hearing or review, or commencing a civil action with respect to such determination or decision (see §§ 404.911, 404.918, 404.946, and 404.951) to correct a finding which suspends benefit payments for an entire taxable year because of earnings therein, unless the correction of such finding is permitted under section 203(g) (1) (B) of the act, as amended in 1958.

[26 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.961 Notice of revision.

(a) When any determination or decision is revised, as provided in § 404.956, § 404.960, or § 404.960a, notice of such revision shall be mailed to the parties to such determination or decision at their last known addresses. The notice of revision which is mailed to the parties shall state the basis for the revised decision.

(b) Where a determination of the Administration is revised under paragraph (a) of this § 404.961, the notice of revision shall inform the parties of their right to a hearing as provided in § 404.963.

(c) (1) Where a hearing examiner or the Appeals Council proposes to revise a decision under paragraph (a) of this § 404.961 and the revision would be based on evidence theretofore not included in the record on which the decision proposed to be revised was based, the parties shall be given notice of the proposal of the hearing examiner or the Appeals Council, as the case may be, to revise such decision, and unless hearing is waived, a hearing with respect to such proposed revision shall be granted as provided in this Subpart J.

(2) If a revised decision is appropriate, such decision shall be rendered by the hearing examiner or the Appeals Council, as the case may be, on the basis of the entire record, including the additional evidence. If the decision is revised by a hearing examiner, any party thereto may request review by the Appeals Council (§§ 404.945 and 404.946) or the Appeals Council may review the decision on its own motion (§ 404.947).

[25 F.R. 5182, June 10, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.962 Effect of revised determination.

Except as provided in § 404.612, the revision of a determination or decision shall be final and binding upon all parties thereto unless a party authorized to do so (see § 404.961) files a written request for a hearing with respect to a revised determination in accordance with § 404.963 or a revised decision is reviewed by the Appeals Council as provided in this Subpart J.

[25 F.R. 5182, June 10, 1960]

§ 404.963 Time and place of requesting hearing on revised determination.

The request for hearing shall be made in writing and filed at an office of the Administration, or with a hearing examiner, or the Appeals Council, within 6 months of the date notice was mailed to the party of the Administration's revised determination. Upon the filing of such a request, a hearing with respect to such revision shall be held (see §§ 404.919–404.938) and a decision made in accordance with the provisions of § 404.939.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.964 Finality of findings in a claim for benefits with respect to other claims on the same earnings record.

Findings of fact made in a determination or decision in a claim by one party for benefits or a lump sum may be revised in determining or deciding another claim for benefits or lump sum on the same earnings record, even though such findings may not be revised in the former claim because of the provisions of § 404.957, except that a finding in con-



nection with a claim that an individual was fully or currently insured at the time he filed his application, at the time of his death, or at any other pertinent time, may be revised only under the conditions specified in § 404.957.

§ 404.965 Imposition of deductions.

The imposition of deductions constitutes an initial determination with respect to each month for which a deduction is imposed. A finding that a deduction is not to be imposed is an initial determination for each month with respect to which the circumstances upon which such finding was based remain unchanged. The suspension of benefits, pursuant to § 404.425, pending a determination as to the applicability of a deduction or deductions under section 203(b) of the act or the suspension of benefits pending a determination as to cessation of disability, shall not, however, constitute an initial determination (see § 404.906 (a) and (b)).

§ 404.966 Change of ruling or legal precedent.

"Good cause" shall be deemed not to exist where the sole basis for reopening the determination or decision is a change of legal interpretation or administrative ruling upon which such determination or decision was made.

§ 404.967 General applicability.

The provisions of §§ 404.957 to 404.959 and 404.964 to 404.966, both inclusive, shall be applicable notwithstanding any provision to the contrary in this Subpart J.

§ 404.968 Certification of payment.

Determination or decision providing for payment. When a determination or decision has been made under any provision of §§ 404.905 to 404.963, inclusive, to the effect that a payment or payments under title II of the act should be made to any person, the Administration shall, except as hereafter provided, certify to the Managing Trustee of the Board of Trustees of the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, as appropriate, the name and address of the person to be paid (see § 404.1601), the amount of the payment or payments from the appropriate Trust Fund, and the time at which such payment or payments should be made.

[25 F.R. 1677, Feb. 26, 1960, as amended at 27 F.R. 4513, May 11, 1962]

§ 404.969 Withholding certification or payments.

After a determination or decision, as described in § 404.968, has been made, the Administration may withhold certification to the Managing Trustee, or, if certification has been made, may notify the Managing Trustee to withhold payments, to the extent and during such time that there is a question as to the validity of such payment or payments to be made pursuant to such determination or decision, by reason of the fact that:

(a) A reconsideration (whether pursuant to a request of the claimant or on the Administration's own motion), hearing, or review, is being conducted, or a civil action has been filed in a district court of the United States, with respect to such determination or decision; or

(b) An application or request is pending with respect to the payment of benefits or a lump sum to another person and such application or request is inconsistent, in whole or in part, with the payment or payments under such determination or decision: *Provided, however,* That certification or payment shall not be withheld under the above circumstances unless evidence is submitted in connection with a request or application described in paragraphs (a) and (b) of this section, which is sufficient to raise a reasonable question as to the validity of the payment or payments under the determination or decision. The Administration shall, however, certify for payment, as provided in § 404.968, any amount of the payment or payments which is not in question. The acceptance of any payment or payments by a person entitled thereto shall be without prejudice to his rights to reconsideration, hearing, or review, as to any additional payment or payments he may claim.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.970 Transfer or assignment.

The Administration shall not certify, as provided in § 404.968, any amount for payment to an assignee or transferee of the person entitled to such payment under the act, nor shall the Administration certify such amount for payment to any person claiming such payment by virtue of an execution, levy, attachment, garnishment, or other legal process or by virtue of any bankruptcy or insolvency proceeding against or affecting the per-



son entitled to the payment under the act.

§ 404.971 Representation of parties.

Appointment of representatives. A party to an initial determination, reconsideration, hearing, or review, as provided in §§ 404.905 to 404.963, inclusive, may appoint as his representative in any such proceeding only an individual who is qualified under § 404.972 to act as a representative. Except where the representative appointed is an attorney, such party must give written notice of the appointment of a representative, signed by the party appointing the representative, and accepted by the representative appointed. The notice of appointment shall be filed at an office of the Bureau, with a hearing examiner, or with the Appeals Council. Where the representative appointed is an attorney, in the absence of information to the contrary his representation that he has such authority shall be accepted as evidence of the attorney's authority to represent a party.

§ 404.972 Qualifications of representatives.

Any individual may be appointed to act as a representative in accordance with § 404.971, unless he is disbarred or suspended from acting as a representative in proceedings before the Social Security Administration or unless otherwise prohibited by law.

§ 404.973 Authority of representatives.

A representative, appointed and qualified as provided in §§ 404.971 and 404.972, may make or give, on behalf of the party he represents, any request or notice relative to any proceeding before the Social Security Administration under title II of the act, including reconsideration, hearing and review, except that such representative may not execute an application for benefits, or the establishment of a period of disability, or a lump sum unless he is a person designated in § 404.603 as authorized to execute an application for benefits, or the establishment of a period of disability, or a lump sum. A representative shall be entitled to present evidence and allegations as to facts and law in any proceeding affecting the party he represents and to obtain information with respect to the claim of such party to the same extent as such party. Notice to any party of any administrative action, determination, or decision, or request to any party for the production of evidence, may be sent to the representative of such party, and such notice or request shall have the same force and effect as if it had been sent to the party represented.

§ 404.974 Proceedings before a State or Federal court.

Any service rendered by any representative in connection with any proceeding before any State or Federal court shall not be considered services in any proceeding before the Social Security Administration for purposes of §§ 404.973, 404.976 and 404.977.

§ 404.975 Fees for services.

Fees for the services of a representative, appointed and qualified in accordance with §§ 404.971 and 404.972 may be charged to, and received from, the party represented only as provided in §§ 404.976 and 404.977. No fees for services in any proceeding under title II of the act shall be charged by or paid to any person except a representative duly appointed and qualified in accordance with §§ 404.971 and 404.972.

§ 404.976 Attorneys.

An attorney who is admitted to practice before a court of a State, Territory, District, or insular possession, or before the Supreme Court of the United States or an inferior Federal court, and who is not otherwise prohibited by law from charging or receiving such a fee, may upon petition therefor and good cause shown charge and receive such fee for services rendered in any proceeding under title II of the act before the Bureau of Old-Age and Survivors Insurance, or a hearing examiner, or the Appeals Council (see § 404.977a), as may be approved by such Bureau, hearing examiner, or Appeals Council, respectively: *Provided*, That no such approval shall be required for charging or receiving a fee for such services in a total amount not greater than the following: Representation before the Bureau only, $20; representation before a hearing examiner and/or the Appeals Council only, $30; representation before the Bureau and a hearing examiner and/or the Appeals Council, $50. This limitation shall be applicable whether the fee is paid by a party to the proceeding or by someone else.

§ 404.977 Individuals other than attorneys.

No individual other than an attorney, as provided in § 404.976, may charge or

receive a fee for services rendered in any proceeding under title II of the act before the Bureau, or a hearing examiner, or the Appeals Council (see § 404.977a), unless he is authorized to do so by the Bureau, a hearing examiner, or the Appeals Council, as stated in this section. An individual other than an attorney who desires authorization to charge or receive a fee for such services shall file a written petition therefor and make a showing that he is not otherwise prohibited from charging or receiving a fee, that he has special qualifications which enabled him to render valuable services to a party in a proceeding before the Social Security Administration, and that he has actually rendered such services to the party he represents. Upon the filing of such petition and a showing that he has rendered such services, the amount of the fee he may charge or receive, if any, shall be determined by the Bureau, a hearing examiner, or the Appeals Council, and no fees shall be charged or received which is in excess thereof.

§ 404.977a Services rendered in a title II proceeding.

Services rendered in a proceeding under title II of the act consist of services rendered in connection with any claim before the Secretary of Health, Education, and Welfare under such title, including any services in connection with any asserted right calling for an initial or reconsidered determination by the Bureau, a decision by a hearing examiner or a decision or order by the Appeals Council. This includes, but is not limited to, services in connection with an application for benefits or a lump sum, the establishment or continuance of a period of disability; a request for a modification of the amount of benefits or lump sum, or the reinstatement of benefits; proof of support from an insured individual by a husband, widower, parent or former wife divorced; and a request for the revision of an earnings record.

§ 404.978 Rules governing the representation and advising of claimants and parties.

No attorney or other person shall:

(a) With intent to defraud in any manner, willfully and knowingly deceive, mislead or threaten by word, circular, letter, or advertisement, either oral or written, any claimant or prospective claimant or beneficiary with respect to benefits, lump sums, periods of disability, establishment or maintenance of earnings records or any other initial or continued right under the act; or

(b) Knowingly charge or collect, or make any agreement to charge or collect, directly or indirectly, any fee in connection with any claim except under the circumstances and within the limitations as to amount prescribed in §§ 404.975 to 404.977, inclusive; or

(c) Knowingly make or participate in the making or presentation of any false statement, representation, or claim as to the amount of wages or self-employment income earned by, or derived by, or paid to, an individual, or the period of such earnings, or the time of payment, or as to any material fact affecting the right of any person to benefits or a lump sum, or the amount of either, or to a period of disability; or

(d) Divulge, except as may be authorized by regulations now or hereafter prescribed by the Secretary, any information furnished or disclosed to him by the Social Security Administration relating to the claim or prospective claim of another person.

§ 404.979 Proceedings for suspension or disbarment.

Whenever the Secretary has knowledge or information that an attorney or other individual has violated any of the provisions of § 404.978, a written statement of the Secretary's charges shall be mailed to such attorney or other individual at his last known address, together with a notice to file an answer, within 30 days from the date of mailing, as to why such attorney or other individual should not be prohibited thereafter from acting as a representative and from charging and receiving fees for services, as provided in §§ 404.973 to 404.977, inclusive. The Secretary may, for good cause shown, extend the time within which the answer may be filed. If an answer is made, it must be in writing under oath and filed within the 30-day

period or such extended time as the Secretary may allow.

§ 404.980 Time and place of hearing on charges.

At the expiration of the time within which an answer may be filed, a time and place shall be fixed for a hearing with respect to such charges, and notice thereof shall be mailed, not less than 15 days prior to the time fixed for the hearing, to the attorney or other individual at his last known address.

§ 404.981 Conduct of hearing and determination of charges.

The hearing shall be held before the Secretary or his authorized representative. Witnesses shall be sworn and evidence recorded. If the attorney or other individual has filed an answer, as provided in § 404.979, he may present evidence in support of his statements or allegations in such answer. If he has filed no answer, he shall have no right to present evidence, but he may appear at the hearing for the purpose of presenting to the Secretary or his authorized representative his contentions with regard to the sufficiency of the evidence or validity of the proceedings on which his disbarment or suspension, if it occurred, would be predicated. On the basis of the evidence adduced at the hearing, the Secretary or his authorized representative shall determine whether the charges have been sustained. If he determines that they have been sustained, such attorney or other individual shall not be qualified to act thereafter as a representative and to charge or receive any fee for services, as provided in §§ 404.973 to 404.977, inclusive. However, such disqualification to act as a representative and to charge and receive fees in accordance with §§ 404.973–404.977 may be limited to a specified period of time. Such determination shall be made in writing and a copy shall be mailed to the attorney or other individual affected.

PART 320—INITIAL DETERMINATIONS UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT AND REVIEWS OF AND APPEALS FROM SUCH DETERMINATIONS [1]

Sec.

320.1 Statutory provisions.
320.5 Initial determinations with respect to claims.
320.8 Notice of initial determination.
320.10 Review of initial determination and notice of decision upon review.
320.12 Appeal from initial determination.
320.15 Execution and filing of appeal from initial determination.
320.18 Referee.
320.20 Powers of referee.
320.22 Notice of hearing.
320.25 Hearing of appeal.
320.28 Development of record.
320.30 Decision or report of referee.
320.32 Effect of decision of referee.

[1] 31 F.R. 10180, July 28, 1966.



Sec.
320.35 Review of decision of referee on motion of Board.
320.38 Appeal to Board from decision of referee.
320.39 Execution and filing of appeal to Board from decision of referee.
320.40 Procedure before Board on appeal from decision of referee.
320.41 Procedure before Board after submission of report by referee.
320.42 Decision of Board.
320.45 Judicial review.
320.48 Representatives of parties.
320.50 Adjudicating office.

AUTHORITY: The provisions of this Part 320 issued under sec. 12, 52 Stat. 1107, as amended; 45 U.S.C. 362.

SOURCE: The provisions of this Part 320 contained in Board Order 58-142, 23 F.R. 8930, Nov. 22, 1958, unless otherwise noted.

§ 320.1 Statutory provisions.

Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. * * * (Section 5 (a), Railroad Unemployment Insurance Act.)

The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits. (Section 5 (b), Railroad Unemployment Insurance Act.)

Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

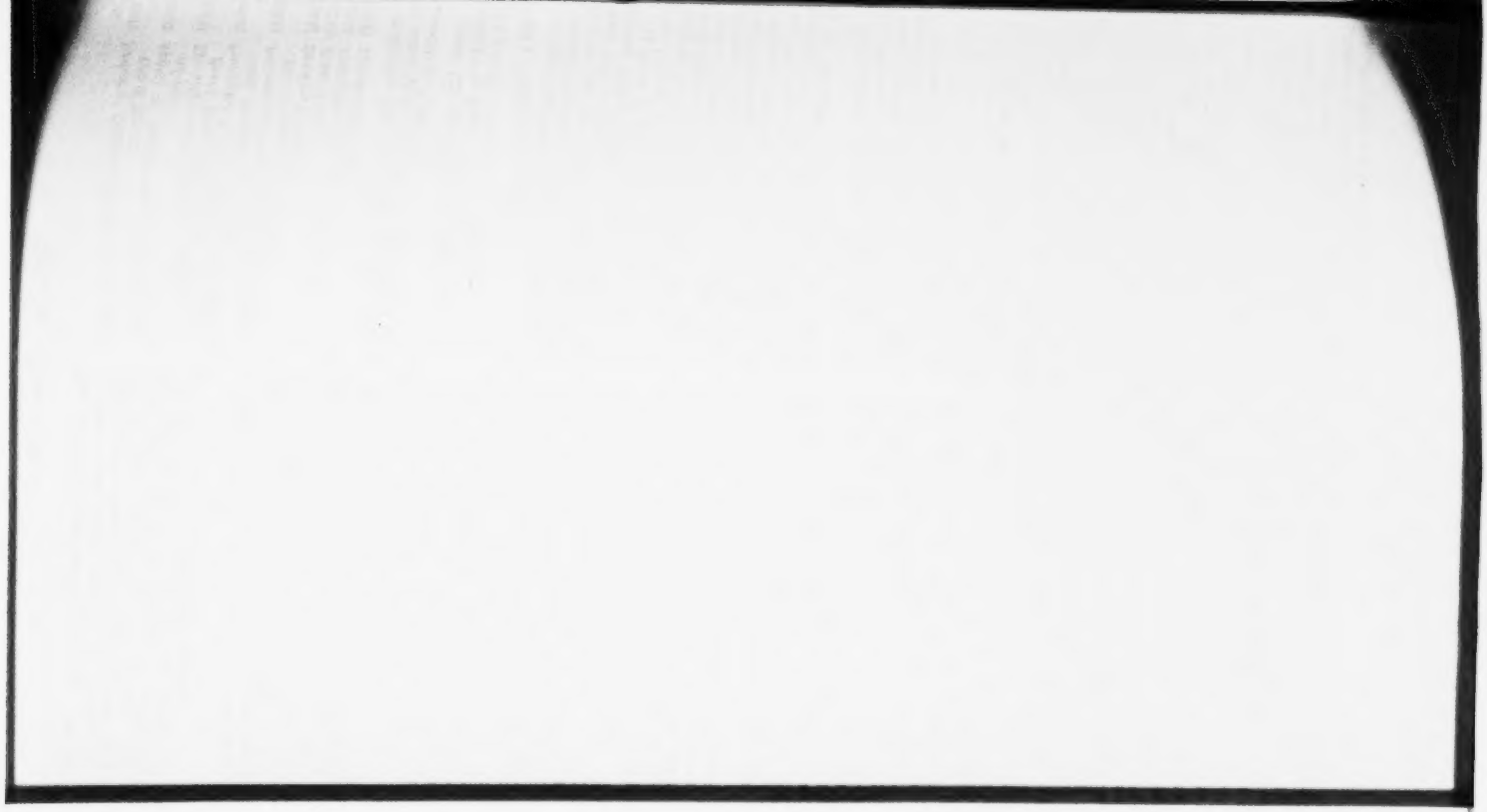
* * * * *

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this act, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f). (Section 5 (c), Railroad Unemployment Insurance Act.)

The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board. (Section 5 (d), Railroad Unemployment Insurance Act.)

In any proceeding other than a court proceeding, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determination. (Section 5 (e), Railroad Unemployment Insurance Act.)



Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the Court of Appeals for the District of Columbia. • • • (Section 5 (f), Railroad Unemployment Insurance Act.)

§ 320.5 Initial determinations with respect to claims.

Each claim for benefits under the Act shall be adjudicated and the initial determination with respect thereto shall be made by an adjudicating office upon the basis of the application and claim, and any statement or supplements filed in connection therewith, the evidence submitted by the claimant, and evidence otherwise available. Claims shall be adjudicated, and initial determinations shall be made, in accordance with instructions issued by the Director of Unemployment and Sickness Insurance. That part of the benefits claimed which is initially determined to be payable may be paid prior to a final decision with regard to such claim.

[Board Order 66-84, 31 F.R. 10180, July 28, 1966]

§ 320.8 Notice of initial determination.

Notice of an initial determination which denies in whole or in part a claim for benefits shall contain a brief statement of the grounds for the denial and shall be communicated in writing to the claimant within 15 days after such initial determination is made. Such notice shall be deemed to have been communicated to the claimant when it will have been mailed to him at the latest address furnished by him.

[Board Order 66-84, 31 F.R. 10180, July 28, 1966]

§ 320.10 Review of initial determination and notice of decision upon review.

(a) *Review.* If, within 1 year after notice of an initial determination has been communicated to a claimant, the claimant, without filing an appeal in the manner and within the time provided in § 320.15, makes an oral or written request for a review of the initial determination, the regional director or other official designated by the Director of Unemployment and Sickness Insurance shall review the determination, shall take any further action which may be required, and shall decide whether to sustain or reverse such determination.

(b) *Notice of decision.* Notice of the decision made upon review shall be communicated to the claimant in writing within 15 days after such decision is made. If the effect of the decision is that the claim is still denied in whole or in part, the claimant shall be notified in the communication of his rights to appeal as provided in §§ 320.12 and 320.15.

[Board Order 66-84, 31 F.R. 10180, July 28, 1966]

§ 320.12 Appeal from initial determination.

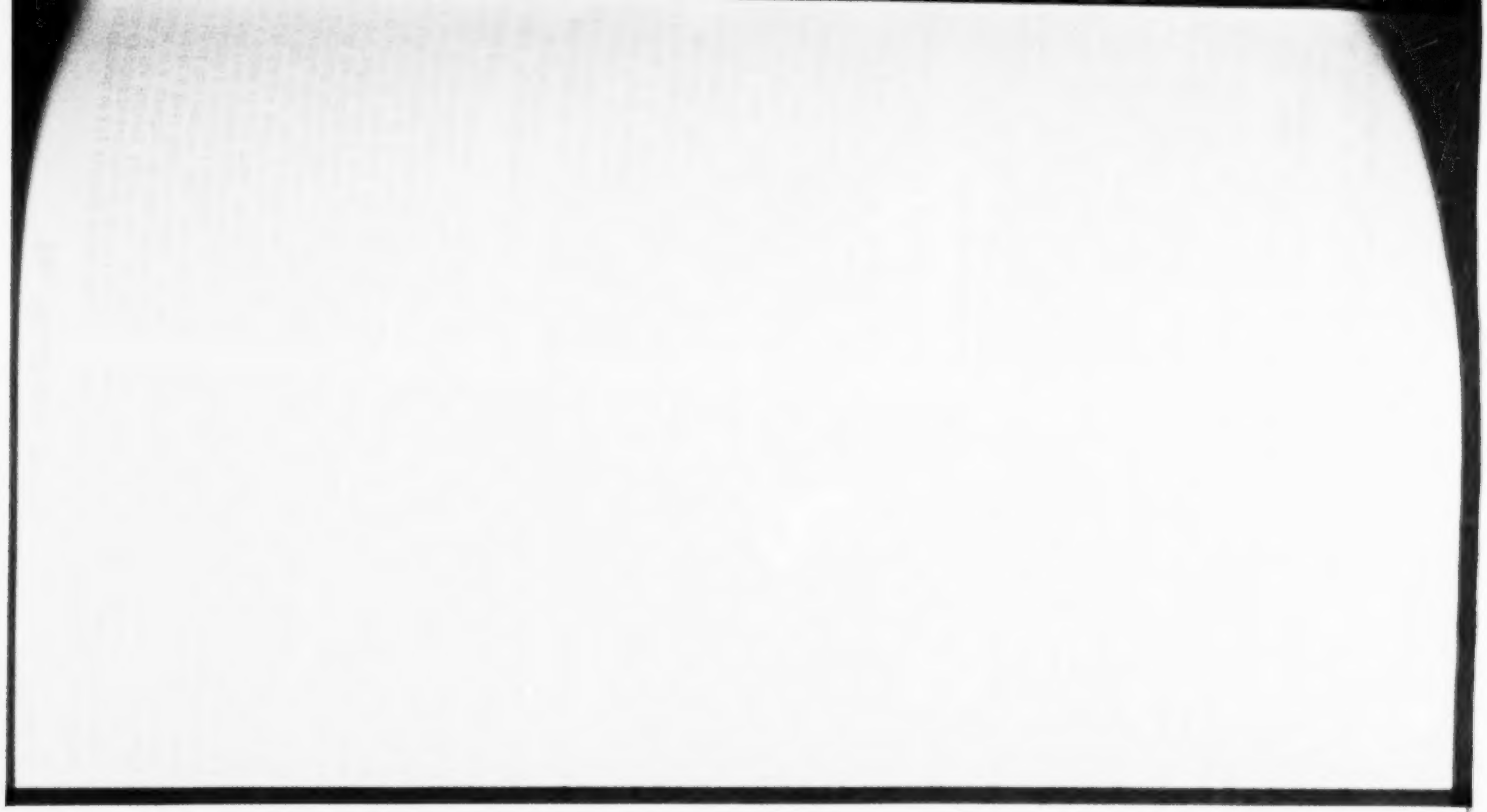
Any claimant may appeal from an initial determination denying his claim for benefits in whole or in part whether or not a review of such determination has been made under the provisions of § 320.10 An appeal shall be made by the claimant's filing, in the manner and within the time hereinafter specified, an appeal from initial determination on the form provided by the Board. Unless an appeal from initial determination is filed by the claimant in the manner and within the time provided in § 320.15, all rights to further review of the initial determination shall be forfeited.

[Board Order 66-84, 31 F.R. 10180, July 28, 1966]

§ 320.15 Execution and filing of appeal from initial determination.

(a) *Execution.* An appeal from initial determination shall be filed on the form provided by the Board and shall be executed in accordance with the instructions on the form.

(b) *Filing.* An appeal from initial determination shall be considered to have been filed when it will have been received in an office of the Board. Such appeal shall be filed within 1 year from the date on which notice of an initial determination is communicated to the claimant or within 30 days from the date on which notice of the decision made



upon review is communicated to him, whichever period ends later.

[Board Order 66-84, 31 F.R. 10180, July 28, 1966]

§ 320.18 Referee.

Within a reasonable time after a claimant has filed a properly executed appeal, the Director of Unemployment and Sickness Insurance shall appoint a referee to act in the appeal. Such referee shall not have any interest in the parties or in the outcome of the proceeding, shall not have directly participated in the initial determination from which the appeal is made, and shall not have any other interest in the matter which might prevent a fair and impartial hearing. In any case in which employee status or creditability of compensation is an issue, the referee shall receive evidence and report to the Board thereon with recommendations. In all other cases, the referee shall consider and decide the appeal; in each such case the claimant shall be granted an opportunity for a hearing.

§ 320.20 Powers of referee.

In the development of an appeal, the referee shall have the power to hold hearings, require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations.

§ 320.22 Notice of hearing.

Promptly after being appointed, the referee shall notify all parties properly interested of their right to participate in the proceeding. Upon the scheduling of a hearing on an appeal, written notice of the hearing, specifying the place and time thereof, shall be given to the properly interested parties at least seven days before the date of the hearing, unless such notice is waived by the parties. Such notice may be mailed to the parties at the latest addresses furnished by them.

§ 320.25 Hearing of appeal.

(a) *Manner of conducting hearing.* The hearing shall be informal, fair, and impartial, and shall be conducted in such manner as to ascertain the substantial rights of the parties.

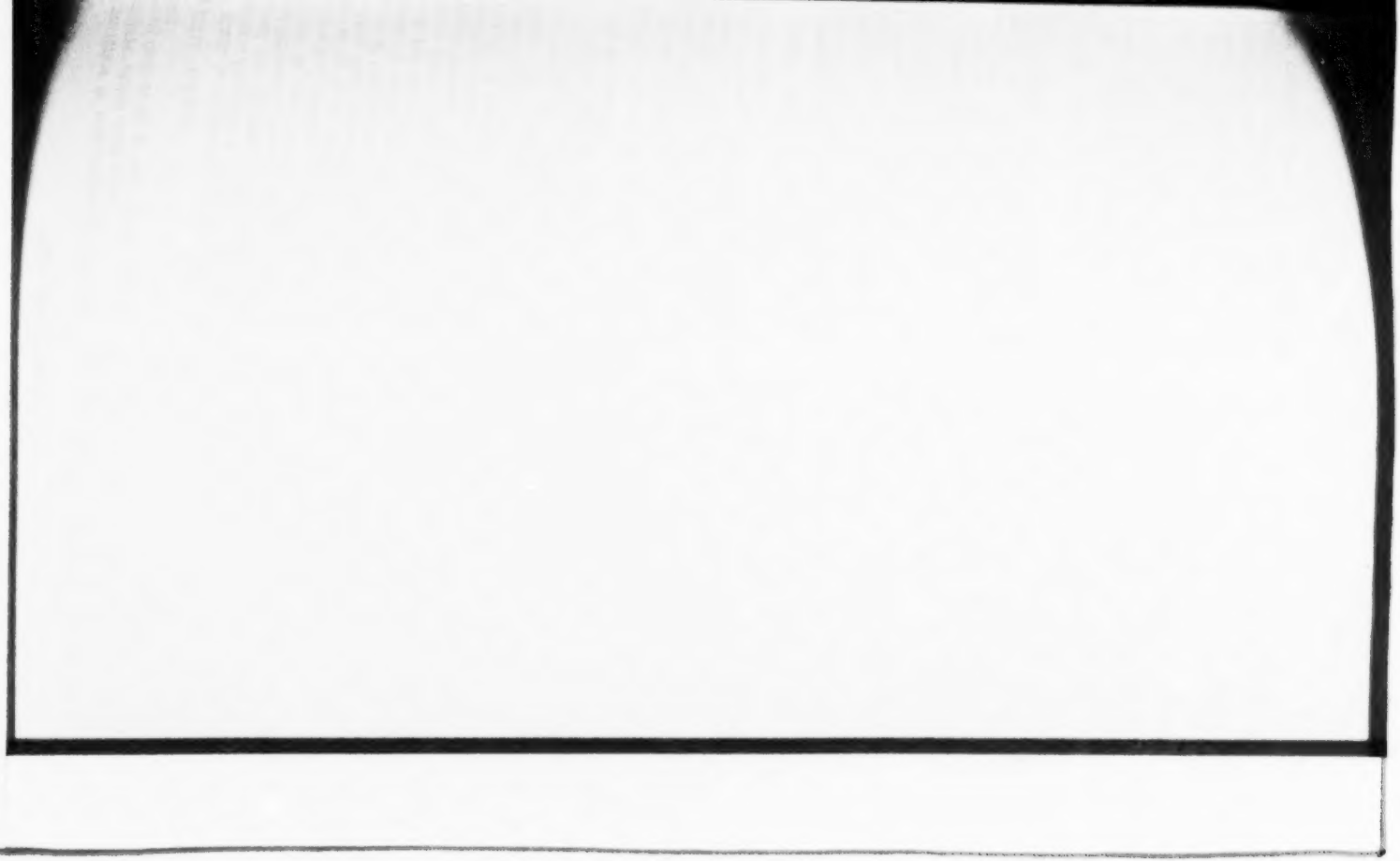
(b) *Compilation of evidence.* Any properly interested party, or his duly authorized representative, shall be afforded full opportunity to present further evidence upon any controversial question of fact, orally or in writing, or by means of exhibits; to examine and cross-examine witnesses, and to present argument. If, in the judgment of the referee, evidence not offered is available and relevant, and is material to the merits of the appeal, the referee shall obtain such evidence upon his own intiative. The referee shall protect the record against scandal, impertinence and irrelevancies, but the technical rules of evidence shall not apply.

§ 320.28 Development of record.

All oral evidence presented at any hearing shall be reduced to writing. All evidence presented by any party or by his duly authorized representative, and all evidence developed by the referee, shall be preserved. Such evidence, together with a record of the arguments, oral or written, and the file previously made in the adjudication of the claim, shall constitute the record. After an appeal from an initial determination is filed, the compilation of the record shall be initiated by the inclusion therein of the file made in the adjudication of the claim; the compilation of the record shall be kept up to date by the prompt addition thereto of all parts of the record subsequently developed. The entire record at any time during the pendency of an appeal shall be available for examination by any properly interested party or by his duly authorized representative.

§ 320.30 Decision or report of referee.

As soon as practicable after the completion of the record, the referee shall render his decision, or submit his report to the Board, as may be appropriate in the case. The decision or report shall be based on the record and shall be in writing. Such decision shall contain a brief statement of (a) the issue or issues raised, (b) the evidence submitted, (c) findings of fact, (d) the decision made, and (e) the reasons therefor. Such report shall contain a statement of (1) the issue or issues raised, (2) the evidence submitted, (3) findings of fact, (4) conclusions of law, (5) recommendations as to the decision to be made by the Board, and (6) such discussion of the foregoing as the referee may desire to present to the Board. Within 15 days after rendition of the decision or submission of the report, a copy of the decision or report shall be mailed to each interested party at the last address of record. In



the case of a report, a copy of the transcript of the hearing, if any was held, shall also be mailed to each interested party.

[Board Order 66-84, 31 F.R. 10181, July 28, 1966]

§ 320.32 Effect of decision of referee.

A decision of the referee, subject to review as hereinafter provided, shall be binding upon any adjudicating office:

(a) With respect to the initial determination involved, and

(b) With respect to other initial determinations, irrespective of whether they have been appealed, which (1) denied in whole or in part claims made by the same claimant in the same benefit year and (2) were based on the same issue or issues determined in the decision of the referee.

[Board Order 66-84, 31 F.R. 10181, July 28, 1966]

§ 320.35 Review of decision of referee on motion of Board.

The Board may, on its own motion, review a decision of the referee on the basis of the evidence previously submitted in the case, and may designate any employee of the Board to take additional evidence and to report his findings to the Board.

§ 320.38 Appeal to Board from decision of referee.

Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which the claimant is a member, or any other party aggrieved by a decision of the referee may appeal to the Board for review of the decision.

§ 320.39 Execution and filing of appeal to Board from decision of referee.

An appeal to the Board from a decision of a referee shall be filed on the form provided by the Board and shall be executed in accordance with the instructions on the form. Such appeal shall be filed within ninety days from the date upon which notice of the decision of the referee was mailed to the parties.

§ 320.40 Procedure before Board on appeal from decision of referee.

If an appeal to the Board from a decision of a referee is filed, the parties shall not have the right to submit additional evidence, except that (a) the Board may permit the submission of additional evidence upon a showing by any properly interested party that he has additional evidence to present which, for valid reasons, he was unable to present at any earlier stage; (b) the Board may request the submission of additional evidence; and (c) the Board may designate any employee of the Board to take additional evidence, and to report his findings to the Board. Any such additional evidence shall be submitted in such manner as the Board may indicate and shall be included in the record.

§ 320.41 Procedure before Board after submission of report by referee.

(a) After submission to the Board of a referee's report, in an appeal involving employee status or the creditability or compensation, any party to the proceeding may, within twenty days after the mailing to him of a copy of the report, file with the Board and serve upon other parties by mailing to their last addresses of record such exceptions in writing as he desires to make to the referee's findings of fact and conclusions of law. Each exception shall specifically designate the particular finding of fact or conclusion of law to which exception is taken, and shall set forth in detail the grounds of the exception. General exceptions and exceptions not specifically directed to particular findings of fact or conclusions of law will not be considered. Each party shall have ten days after the receipt of exceptions taken by other parties in which to file with the Board replies to the exceptions. The Board may, upon the application of any party and for cause shown, extend the time for filing and serving of exceptions or filing of replies thereto. The referee's report shall be advisory but shall be presumed to be correct. Findings of fact to which no exceptions are taken will, subject only to the power of the Board to reject or modify, stand confirmed.

(b) Further argument will not be permitted except upon a showing by any party that he has arguments to present which for valid reasons he was unable to present at an earlier stage, and in cases in which the Board requests further elaboration of arguments. In such cases, the further argument shall be submitted orally or in writing, as the Board may indicate in each case, and shall be subject to such restrictions as to form, subject matter, length, and time as the Board may indicate.

§ 320.42 Decision of Board.

The decision of the Board, whether on an appeal to the Board from a decision of a referee, or after submission of a report by a referee, shall be made upon the basis of the record established in accordance with the foregoing sections. Notice of such decision, together with the Board's findings of fact and conclusions of law in connection therewith, shall, within 15 days from the date on which the decision is made, be mailed to the parties at the latest addresses furnished by them. Subject only to judicial review in accordance with § 320.45, the decision of the Board shall be final and conclusive for all purposes:

(a) With respect to the initial determination involved, and

(b) With respect to other initial determinations, irrespective of whether they have been appealed, which (1) denied in whole or in part claims made by the same claimant in the same benefit year and (2) were based on the same issue or issues determined in the decision of the Board. In a case in which there has been a referee's report, in an appeal involving employee status or the creditability of compensation, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under the Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

[Board Order 66-84, 31 F.R. 10181, July 28, 1966]

§ 320.45 Judicial review.

Upon being notified of a decision of the Board made (a) upon review, on the Board's own motion, of a decision of a referee, or (b) upon an appeal to the Board, the party may obtain judicial review of such final decision, by filing a petition for review within ninety days after the date on which notice of such decision was mailed to him, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the Court of Appeals for the District of Columbia.

§ 320.48 Representatives of parties.

In the event a party to any proceeding within the Board, under the preceding regulations in this part, desires to be represented by another person, he shall file with the Board prior to the time of such representation a power of attorney signed by him and naming such other person as the person authorized to represent him: *Provided, however,* That without requiring such power of attorney the Board may recognize as the duly authorized representative of the claimant the person designated by the claimant's railway labor organization to act in behalf of members of that organization on such matters whenever such representative acts or appears for such claimant.

§ 320.50 Adjudicating office.

As used in this part the term "adjudicating office" means any subordinate unit of the Board which may be authorized to make initial determinations with regard to applications and claims for benefits under the Act.

[Board Order 66-84, 31 F.R. 10181, July 28, 1966]

Affidavit of Magdalena Mulei in Opposition to Defendants' Motions

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MAGDALENA MULEI, being duly sworn, deposes and says: that I currently reside at 144 West 119th Street, New York, New York, with my two children.

My Aid to Dependent Children was suspended effective March 16, 1968, on the ground that my new husband was able to provide for my illegitimate children.

In order that my family would not be subjected to irrevocable injury due to the cessation of assistance, the New York City Department of Social Services reinstated assistance to my family pending a decision after a fair hearing before the State on the issue of Mr. Mulei's liability to support the children.

A fair hearing was held March 21, 1968, at which time extensive testimony was taken concerning a central factual issue, Mr. Mulei's refusal to provide any aid whatever to the children.

Defendant Wyman refused to reach a decision on the merits for, as stated in his decision of April 18, 1968, "a Fair Hearing prior to discontinuance" is neither authorized or provided for by the relevant statutes and regulations.

The City thereafter continued aid to my family, and in compliance with the new termination procedures notified

me on or about June 1, 1968, of their intention to discontinue assistance.

Also in accordance with the new termination procedures, I received review prior to termination. As a consequence of its negative outcome, the City mailed me a notice of termination on June 21, 1968.

I did not receive my July 1, 1968, check, and my family is now suffering irrevocable harm because of Defendant's denial of assistance.

Magdalena Mulei

(Sworn to July 8, 1968.)

Affidavit of Alma Coldburn in Opposition to Defendants' Motion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

ALMA COLDBURN, being duly sworn, says: that I reside at 521 Thatford Road, Brooklyn, New York, and was a recipient of Aid to Dependent Children in the amount of $117.45 on behalf of myself and my son, Frederick until March 1, 1968.

My aid was suspended pursuant to a notice dated February 20, 1968 for the reasons stated therein that I owned a car, was living with a man, and had a bank account which I failed to report.

I admit that I do own a car but that it is a necessity for use in going to and from my doctors. I have been going to doctors for the reason that I have been recuperating from a major operation that I had in the Fall of 1967. I visit my doctors at least once every week, and have had to go to the hospital for emergency treatment at least several times a month, the latter occurring often late at night.

It is not true that a man was living with me as alleged in the notice suspending my assistance. This man was merely a friend who rendered assistance when I was ill. He would often drive me to the hospital when I was too ill to drive myself.

The bank account which was unreported contained less than five dollars in it and I never intended to conceal this fact from anyone.

Affidavit of Alma Coldburn

I was never given an opportunity for a hearing prior to the termination of the assistance. When the time came for my Fair Hearing on March 28, 1968 it was adjourned at that time without a date as to when the next hearing would be held.

My counsel requested by letter dated April 15, 1968 that the hearing be rescheduled on an emergency basis. On April 30, 1968 the hearing was resumed and then adjourned at 5 P.M. on that date over the objection of my counsel. I also remember that the hearing started over an hour late on that date.

The hearing finally resumed on May 27, 1968 and was completed on that date. As of the present time no decision has been rendered.

I have reapplied for aid several times during this period and have been constantly told that my case had only been suspended and that there was no need to reapply.

I have not been able to work because of my illness and I am constantly without money for food and other necessaries.

Alma Coldburn

(Sworn to July 8, 1968.)

Affidavit of Angelina Velez in Opposition to Defendants' Motions

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
County of New York) ss.:

ANGELINA VELEZ, an intervenor plaintiff herein, being duly sworn, says:

1. My four small children and I were receiving public assistance in the AFDC category till March 11, 1968, when further assistance to us was suspended. The reason given for the suspension was that I was living with my husband.

2. My husband and I have been living separately since December 1963. Since that time my husband has regularly given me $20 a week for mine and the children's support; this April 5, in the Family Court of the City of New York he agreed to increase his contribution to $30 a week. These payments are not enough for us to live on and my children and I must also depend on public assistance payments.

3. I was not given any hearing prior to my suspension; I requested a fair hearing. The fair hearing scheduled for April 18, 1968 was adjourned when representatives of the Department of Social Services did not appear. My fair hearing was then rescheduled for June 6, 1968; the hearing

could not be completed by 5 p.m. on that day and therefore was continued on June 17, 1968. I am now waiting for the decision after fair hearing.

4. My children and I have suffered great hardship since we were taken off public assistance. While the Department of Social Services agreed to pay my rent for last April on an emergency basis, they refused to pay my rent for May. Since I was unable to pay the rent of $75, my children and I were evicted from our apartment at 351 Broadway, Brooklyn, New York, at the end of May, 1968.

5. Since the end of May my children and I have been staying in the apartment of my sister Eva Ruiz at 111-57th Street, Brooklyn, New York. My sister has nine children of her own and is a recipient of public assistance. Three of my children and I have been sleeping on two single beds in one small room; another child sleeps in a crib in the same room.

6. Since our public assistance payments were stopped, I have been unable to feed my children adequately; frequently we have only two meals a day. The children have lost weight and are suffering from diarrhea. In addition all of us, children and adults are suffering from the strain of 13 children and 2 adults living in one apartment.

Angelina Velez

(Sworn to July 8, 1968.)

Affidavit of Marianne Rosenfield in Opposition to Defendants' Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:
City of New York)

MARIANNE ROSENFIELD, being duly sworn, deposes and says:

1. That I am an attorney, employed at the Welfare Law Unit of Mobilization for Youth, Legal Services Unit, and admitted to practice law at the Bar of New York, that I reside at 22 West 90th Street, New York, New York.

2. That I have personally handled over one hundred welfare cases, directly supervised many more such cases handled by five law students and two social workers in our office, and advised attorneys, social workers, and welfare recipients over the telephone.

3. That I make this affidavit to apprise the Court of my experiences with the administration by the New York City Department of Social Services of its emergency assistance program.

4. That emergency assistance is relevant to three categories of welfare recipients: those whose cases have been terminated or suspended; those whose regular recurring semi-monthly checks have not arrived or have been stolen;

those who have applied for welfare, but whose cases have not yet been opened by the Department.

5. That in termination and suspension cases the granting of emergency assistance is sporadic and inadequate. After termination of their cases, and prior to the commencement of this action, we had to write special letters for each of our clients, Kelly, Young, and de Jesus, plaintiffs in this action, every time it was necessary for them to secure an emergency grant of $1.00 per day for food and emergency shelter for the night in a flophouse. Each time our clients were in need of such assistance it was necessary for them to come to us for the letter, go to the one Emergency Welfare Center which must service all five boroughs of New York City, and wait several hours. Although the circumstances creating the need for emergency assistance were the same for each man each time he went to the Center, the grants were sometimes given and sometimes withheld.

That after the New York State Department of Social Services promulgated its original prior review regulation, but before implementation of that regulation by the City, the City Department's general policy was to refuse requests for emergency assistance after a case was terminated, on the presumption that a terminated recipient was ineligible.

In the cases of Maria Fuentes and Felix Gomez, plaintiff-intervenors in this action, people at various levels in the hierarchy of the welfare centers denied assistance after termination until my office intervened by calling the City's Office of Counsel in the Fuentes case and the State Department of Social Services in the Gomez case. Although our agreements with those offices were that assistance in these two cases would be continued at the regular level until a decision after a fair hearing, our clients inform me that never since termination have they received the same

amount of assistance as they received before termination. I had to write letters for these clients because they had been informed that they could not receive emergency assistance without a letter from a third party substantiating need. My clients would call me from the centers, saying that they had been waiting for several hours or all day. I had then to call either City Counsel or the State Department and ask them to call the centers in order to get some action for my clients.

I believe that the granting of assistance sending a fair hearing decision was not a result of any established regulation, policy, or pronouncement of the City or State, but solely the *ad hoc* result of the negotiation between deponent and the legal staff of the City Department.

6. That when regular checks are not received or are stolen, emergency assistance may or may not be granted. If granted, it may cover only food money, $1.15 per day per person, $1.00 per day for infants up to one year old; it may include food and rent.

My office has handled two typical cases in the last three weeks. One recipient, who has four children, one less than one year old, received no regular check on July 1, 1968. A regular check includes money for food, rent, utilities, clothing, transportation and laundry. On July 1, her center issued $8.90 which was to last until July 3. The sum was improperly calculated: a two-day allowance for four people and one infant should be $11.80. The client was forced to borrow money to feed her children dinner on July 2. At 9 a.m. on July 3, she went to her welfare center as instructed by her worker. She waited there until 3:55 without receiving any money, even though our office had spoken to both the case worker and the unit supervisor several times during the day and had been assured that they would see to the matter right away. At 3:55, I called the City's Central Office, which in turn contacted the Senior Case

Supervisor. As a result of this intervention, at 4:30 she again received the incorrect amount of $8.90 and was told to return on July 5, if her check had not yet arrived. Neither the client nor her children had eaten all day.

In the other case, a woman and her two-year-old son were told by the Department to look for an apartment. The mother found one and called the worker to ask for approval, rent and security. She was told the apartment could not be approved because her case had been closed. She said she received no notice of proposed termination. When I called the Supervisor, he refused either to give emergency aid or to approve the apartment, despite the client's statement that she had no money at all, no place to sleep, and no food for herself and her child. The Supervisor justified this refusal on the grounds that his books showed an emergency food and shelter grant had been issued to last her for two more days, a fact denied by the recipient. The Supervisor refused to discuss with me the client's current state of need. As a result, the client tells me she lost the apartment, and had to sleep on the floor in the apartment of a family that took pity on her.

7. I believe that Chapter 992 of the Laws of 1968, cited in Mr. Keyes' and Mr. Charleton's affidavits, and as yet unimplemented, does not adequately eliminate the sufferings due to wrongful terminations prior to a full, due process hearing. The new Statute applies only to recipients of Aid to Dependent Children; assistance is authorized only for a period of thirty days, which is insufficient, according to Mr. Keyes' affidavit, to cover a client's needs from termination until date of decision. The current level of emergency payments is well below the regular payments which the City computes as the basic minimum necessary to survive.

Marianne Rosenfield

(Sworn to July 12, 1968.)

Affidavit of Alma Coldburn in Opposition to Defendants' Motions

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ 394

68 Civ 864

[SAME TITLE]

State of New York)
County of New York) ss.:

ALMA COLDBURN, being duly sworn, says:

On July 12, 1968 at 9:15 in the morning I went to the Department of Social Services Welfare Center at 240 Livingston Street, Brooklyn, New York to apply for emergency assistance. I was told that because I have a car, I would not get any assistance. This is the question to be decided at my fair hearing. I was also informed that I could not get any assistance until a determination was made on my fair hearing. All of this was said to me over the telephone by someone in one of the offices at the Welfare Center; I

demanded to see someone in person. Finally a Mr. Cohen came down and told me that nothing could be done for me until the fair hearing determination in my case was made.

Alma Coldburn

(Sworn to July 12, 1968.)

Affidavit of Louise Gruner Gans in Opposition to Defendants' Motions

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ 394

68 Civ 864

[SAME TITLE]

State of New York)
County of New York) ss.:

LOUISE GRUNER GANS, being duly sworn, says:

I am an attorney on the staff of the Legal Aid Society, and in that capacity have represented over 100 clients in matters involving public assistance. In many of the cases I have been concerned with helping clients to obtain emergency assistance. Though emergency assistance is authorized by Section 139 (a) 5 of the Social Services Law and by Section 351.13 (d) of the State Department of Social Services Regulations, I have consistently found the personnel of the New York City Department of Social Services obstructing the granting of emergency assistance in the following ways:

Affidavit of Louise Gruner Gans

1. Refusal of emergency assistance to persons whose cases have been terminated and who are awaiting fair hearing or decision after fair hearing on the ground that "the case is closed" regardless of actual evidence of client's need. This was the procedure followed by the Department in the case of intervenor-plaintiff Angelina Velez who was denied emergency assistance at least three times following her termination.

2. Refusal of emergency assistance to persons whose cases have been terminated (as well as to other classes of applicants) on the ground that the applicant has adequate financial resources, when in fact such resources consist of unliquidated claims or unliquidated assets. Thus a woman whose husband is required to make support payments to her is credited with those payments even where she has failed to receive them and would have to go to court to collect them; similarly, a woman who had been abandoned by her husband and had no money left for food was initially denied emergency assistance because she was joint owner of her one-family home.

3. Insistence on extensive investigation and verification before an emergency grant is issued. One client who applied for emergency assistance claimed he had no money for food but was not given assistance until several days after his first application because he could not produce the name and address of his landlord—his rent was collected personally by an agent.

4. Emergency assistance when granted is generally limited to an allowance of $1.15 per person per day for food, plus carfare to and from the Welfare Center. This

food allowance will be issued to cover no more than 2 or 3 days at a time; at the expiration of the 2 or 3 days, another trip to the Welfare Center must be made to establish continued need. If a client spends his or her allowance before the prescribed time for reapplication, additional funds will not be issued.

5. Applications for emergency assistance for payment of rent are strenuously resisted. Many hours of counsel's time may be required before such a grant will be issued if it is issued at all.

6. It is not unusual for an applicant for emergency assistance to be kept waiting at the Welfare Center for an entire day or longer before his or her application will be processed or the emergency grant issued.

On information and belief, Chapter 992 of the Laws of 1968 providing for emergency assistance in cases where "grants for aid to dependent children have been discontinued and fair hearings have been requested" has not yet been officially published; neither has it been implemented by State Regulation. On information and belief, the new law will limit the grant of emergency assistance to a period of 30 days. I do not believe this new law will provide adequate protection from irreparable harm to welfare recipients who have been terminated without a prior fair hearing. The law applies to ADC cases only and thus will not protect welfare recipients in other categories; it is not certain what items will be included in the emergency assistance grant; fair hearings would have to be requested, scheduled, held and decided with utmost promptness and punctuality if the emergency grant were to cover the entire

period of termination. Even then, it would take only one adjournment or other delay to make even the ADC client no longer eligible for emergency assistance. Given the present admitted delay in fair hearing procedures, the new law would provide emergency assistance to a terminated client for only a third of the time during which such assistance would in fact be needed.

Louise Gruner Gans

(Sworn to July 12, 1968.)

Affidavit of Robert B. Keyes in Support of Defendants' Motions for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of Albany) ss.:
City of Albany)

ROBERT B. KEYES, being duly sworn, deposes and says:

1. That he is an Associate Attorney in the New York State Department of Social Services, Office of Counsel, and that he is in charge of the Fair Hearing Section.

2. That it is deponent's best information and belief that the State Department of Social Services does not at this time intend to proceed with and put into effect its proposed flat grant system of payments and it is further deponent's best information and belief that the Department's proposed flat grant system of payments would not make any change in the procedural Rules and Regulations pertaining to fair hearings.

3. That statistical information as to the reason for adjournments of fair hearing cases is compiled from information noted as part of the case file, and from information noted on the daily calendar sheets. The information is noted directly by the hearing officer as part of the case file, when the application for adjournment is made to him. The information is noted by authorized clerical personnel when applications for adjournment are made by letter or

by telephone and there is no need to refer the application to a hearing officer.

4. That the available statistical information for the months of April, 1968, May, 1968 and June, 1968 on discontinuance cases only is as follows:

	New York	*Upstate*	*Total*
Cases on hand as of March 31, 1968	12	19	31
Requests for hearing received in			
April, 1968	17	44	61
May, 1968	29	75	104
June, 1968	28	70	98
Total	86	208	294
Cases closed from April 1-June 30, 1968			
(a) By decision	16	20	36
(b) By withdrawal	7	74	81
(c) By default	13	49	62
Total	36	143	179
Cases pending as of June 30, 1968	50	65	115
Decisions in process	13	16	29
Hearings scheduled	19	21	40
Hearings to be scheduled	4	3	7
Defaults and withdrawals in process of being confirmed	14	25	39
Total	50	65	115

Affidavit of Joel H. Sachs in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General of the State of New York in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants, Wyman and the New York State Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case.

Annexed hereto is newly adopted regulation 372 of the New York State Department of Social Services which provide for emergency assistance to needy families with children. This regulation was adopted pursuant to Chapter 992 of the Laws of 1968. It should be noted that these provisions for emergency assistance supplement those that are already in effect in various local welfare agencies throughout the State of New York.

Joel H. Sachs

(Sworn to July 22, 1968.)

Exhibit to Sachs Affidavit

New Regulation

(See Opposite ☞)

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STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

Pursuant to the provisions of sections 20 and 34 of the Social Services Law and Chapter 992 of the Laws of 1968, I, George K. Wyman, Commissioner of Social Services, do hereby amend in part, as hereinafter indicated, Article 2 of Subchapter B and sections 310.3, 370.2, 370.3 and 370.8 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18, NYCRR, effective as of July 1, 1968.

Article 2 of Subchapter B is hereby amended by adding thereto a new Part to be Part 372 to read as follows:

PART 372
EMERGENCY ASSISTANCE TO NEEDY FAMILIES WITH CHILDREN

Section 372.1 Definitions. (a) As used in this Part, the term emergency assistance means aid, care and services furnished for a period not in excess of 30 days in any 12-month period to or on behalf of a needy child under 21 years of age and any other member of the household in which he lives when such child lives with a relative in a residence maintained by such relative as his own home.

(b) 30 days means 30 consecutive days.

(c) Relative means a person related to a child by blood, marriage or adoption, who is among those listed in board rule 80.1 who would be eligible to receive ADC on behalf of an eligible child.

(d) Needy families with children includes migrant workers with families in the State.

372.2 Eligibility. Eligibility for Emergency Assistance to Needy Families with Children shall be based upon each of the following factors:

(a) The child is, or within six months prior to the month in which such assistance is requested has been, living with a relative in a residence maintained by such relative as his own home.

(b) The child is without resources immediately available to meet his needs.

(c) Assistance, care or services are necessary to avoid destitution or to provide living arrangements in a home for the child.

(d) Destitution or need for living arrangements is not due to the refusal, without good cause, of the child or relative to accept employment or training for employment.

372.3 Provision of Emergency Assistance to Needy Families with Children. (a) Emergency assistance shall be available in emergency situations including, but not limited to, those caused by natural disasters, serious injury to persons or damage to property, and discontinuance or suspension of ADC where a fair hearing has been requested.

(b) Emergency assistance shall be provided immediately when emergency conditions exist.

372.4 Scope of assistance. Emergency Assistance to Needy Families with Children shall include the following:

(a) Money payments, vendor payments and payments in kind for food, clothing, household supplies and equipment, utilities, transportation, shelter (including cost of repairs to recipient-owned homes), moving expenses, and other emergency needs, including payments to meet needs which arose prior to the 30-day period for which emergency assistance is authorized such as overdue utility bills, or which extend beyond the 30-day period such as rent or replacement of clothing or essential household furnishings.

(b) In situations of mass emergency, payment for costs of medical care, services and supplies, mass feeding and clothing distribution, and other essential articles such as blankets.

(c) Services necessary to cope with the emergency situations including information, referral, counseling, securing family shelter, child care (including day care and temporary foster care), and any other services which meet needs attributable to the emergency situation.

372.5 Application. (a) An application for Emergency Assistance to Needy Families with Children, made by an individual family not currently in receipt of public assistance, shall be recorded on Form WS-11, Application for Public Assistance or Request for Care. For a family currently in receipt of public assistance, no additional application is required.

(b) When emergency assistance is required on a mass basis, names of families requesting such assistance recorded on Form DSS-880, Register of Applications and Authorization for Emergency Assistance, shall constitute their application.

372.6 Authorization. (a) A Form DSS-638, (formerly PA-16), Authorization of Grant, shall be marked "EAF" to identify it as Emergency Assistance to Needy Families with Children when the application for assistance is made by an individual family.

(b) In situations of mass emergency, the register of families applying for such emergency assistance (Form DSS-880), when signed by the authorizing official, shall serve as the authorization of such assistance.

(c) The beginning of the 30-day period of emergency assistance shall be the date of authorization of the first item of emergency assistance on Form DSS-638 or on Form DSS-880.

Subdivision (a) of section 310.3 is hereby amended by adding thereto a new paragraph to be paragraph (3) thereof to read as follows:

(3) Migrant workers with families in the State shall be eligible for emergency assistance to needy families with children in accordance with the provisions of Part 372 of department regulations.

Section 370.2 is hereby amended to read as follows:

370.2 Emergent and short-term cases. (a) Adaptation of policy and procedure for home relief. Each agency administering home relief shall appropriately modify its methods of investigation and its standards of assistance in order to provide effectively and promptly for needs which are emergent, short-term or for only specific budgetary items, and to provide necessary supervision to cases in order to modify or terminate grants as quickly as circumstances require. A short-term case is a case in which need is presumed to continue for a period of less than three months provided, however, that cases in which frequent reapplications for assistance are made shall not be considered "short-term."

Section 370.2 is further amended by adding thereto a new subdivision to be subdivision (b) to read as follows:

(b) Mass emergency assistance. Persons requiring emergency assistance on a mass basis including, but not limited to, mass feeding and clothing distribution and other essential articles such as blankets, in situations where such measures are necessary and under circumstances where the applicants are not eligible for emergency assistance to needy families with children as provided for in Part 372 of department regulations shall be considered emergent and short-term cases, and such assistance shall be granted as home relief.

Subdivision (e) of section 370.3 is hereby amended to read as follows:

(e) Emergency grants. (1) When emergent need is met prior to the completion of investigation, there shall be fully recorded the evidence on which presumption of eligibility and need are based. Whenever there is presumptive eligibility for AABD or ADC, need shall be met through use of categorical preinvestigation grants rather than emergency home relief grants. However, when application is made to a town or city social services officer, he may make an emergency grant of HR and immediately forward the application to the county department of social services for investigation. Such investigation shall be completed as promptly as possible, at least within 30 days.

Subdivision (e) of section 370.3 is further amended by adding thereto a new paragraph to be paragraph (2) to read as follows:

(2) When emergency assistance is required on a mass basis, names of persons requesting such assistance recorded on Form DSS-880, Register of Applications and Authorization for Emergency Assistance, shall constitute their application for home relief.

Subdivision (b) of section 370.8 is hereby amended by inserting "(1)" between the heading and the body thereof, and is further amended by adding thereto a new paragraph to be paragraph (2) thereof to read as follows:

(2) In situations of mass emergency, the register of persons applying for such emergency assistance, Form DSS-880, when signed by the authorizing official, shall serve as the authorization of such assistance as home relief, and all authorizations of home relief on such form shall be designated as federally non-participating by the use of the letters FNP.

Date: July 1, 1968

Signed: _____
COMMISSIONER

This is to certify that this is the original of an order of the State Department of Social Services, made on July 1, 1968, amending in part, Article 2, of Subchapter B and sections 310.3, 370.2, 370.3 and 370.8 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18, NYCRR.

Date: July 1, 1968

Signed: _____
COMMISSIONER

Affidavit of Robert B. Keyes in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of Albany) ss.:
City of Albany)

ROBERT B. KEYES, being duly sworn, deposes and says:

1. That he is an Associate Attorney in the New York State Department of Social Services, Office of Counsel, and that he is in charge of the Fair Hearing Section.

2. That attached herewith is the Fair Hearing Report for the month of June, 1968, submitted by Office of Counsel to the Commissioner of the State Department of Social Services.

Robert B. Keyes

(Sworn to July 10, 1968.)

Exhibit to Keyes Affidavit

Fair Hearing Report for June 1968

(See Opposite ☞)

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF JUNE, 1968

	New York City		Upstate	Totals
	Adequacy	Other[a]	(All issues)	
1. Matters on hand on June 30, 1968	1031	223	403	1657
2. Requests for hearings in June, 1968	381	165	349	895
3. Total matters in office in June, 1968	1412	388	752	2552
4. Matters closed in June, 1968				
a) By decision	27	9	24	60
b) By withdrawal	178	18	66	262
c) By default[b]	475	33	81	589
Totals	680	60	171	911
5. Total matters pending in office on June 30, 1968	732	328	581	1641
a) Decisions in process	106	43	112	261
b) Hearings scheduled	210	122	279	611
c) Hearings to be scheduled	19	18	15	52
d) Defaults and withdrawals in process of being confirmed	397	145	175	717
Totals	732	328	581	1641

a Denial, discontinuance, failure to act, miscellaneous

b Neither appellant nor representative appeared

	New York City		Upstate	Totals
	Adequacy	Other	(All issues)	
6. Calendar action in month of June, 1968				
a) Matters scheduled for hearing in June, 1968	378	120	158	656
b) Hearings held and completed	33	24	36	93
c) Hearings adjourned				
1) At request of appellant	57	35	27	119
2) At request of agency	26	10	5	41
3) Other[c]	16	5	4	25
d) Confirmed withdrawals	120	13	26	159
e) Unconfirmed withdrawals	6	0	34	40
f) Defaults	120	33	26	179
g) Duplication	0	0	0	0
Totals	378	120	158	656
7. Special accommodation hearings for appeallants who are unable to appear at regularly scheduled hearings or because of employment or infirmity				
a) Night hearings	0	1	0	1
b) Hearings held in appellants' homes	2	0	1	3
c) Hearings held for appellants in hospitals	0	0	2	2
Totals	2	1	3	6

c Due to Memorial Holiday for Senator Robert Kennedy

8. Disposition of Matters by decision after fair hearing (Statewide)

	Adequacy	Discontinuance	Other[d]	Totals
a) Affirmed	29	4	8	41
b) Reversed	4	2	1	7
c) Reversed in part	3	0	0	3
d) Remand	4	2	1	7
e) Miscellaneous	2	0	0	2
Totals	42	8	10	60

9. Time lapse of matters disposed of by decision after fair hearing (Statewide - all issues)[e]

Time Lapse	No. of Matters
Over 90 days	43
Over 80 days	6
Over 70 days	3
Over 60 days	4
Over 50 days	1
Over 40 days	3
Total	60

10. Decisions without hearing 0

d. Denial, failure to act, miscellaneous

e. Beginning with the day of Department's receipt of request for fair hearing

Affidavit of Joel H. Sachs in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Wyman, Commissioner of the New York State Department of Social Services, Jones, and the New York State Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case.

Attached herewith are copies of the Fair Hearing Reports for the months of July, 1968 and August, 1968 compiled by the New York State Department of Social Services.

Joel H. Sachs

(Sworn to September 11, 1968.)

Exhibit to Sachs Affidavit

Fair Hearing Reports for July and August 1968

(See Opposite ☞)

STATE DEPARTMENT OF SOCIAL SERVICES
ALBANY, NEW YORK

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF JULY, 1968

	New York City			Upstate			Totals
	a	b	c	a	b	c	
1. Matters on hand on July 31, 1968	732	69	259	233	97	243	1633
2. Requests for hearings in July, 1968	634	24	103	121	61	127	1070
3. Total matters in office in July, 1968	1366	93	362	354	158	370	2703
4. Matters closed in July, 1968							
a) By decision	36	11	7	10	13	11	88
b) By withdrawal	164	12	23	45	48	84	376
c) By abandonment	19	5	7	18	19	34	102
d) By duplication	1	0	0	0	0	0	1
Totals	220	28	37	73	80	129	567
5. Matters pending in office on July 31, 1968	1146	65	325	281	78	241	2136
a) Decisions in process	119	5	32	38	25	41	260
b) Hearings scheduled	377	29	91	55	23	59	634
c) Hearings to be scheduled	634	6	156	104	12	52	964
d) Abandonments and withdrawals in process of being confirmed	16	25	46	84	18	89	278
Totals	1146	65	325	281	78	241	2136

a) Adequacy issues
b) Discontinuance or suspension issues
c) Denial, failure to act, miscellaneous

	New York City			Upstate			Totals
	a	b	c	a	b	c	
I. Calendar action in month of July, 1968							
a) Matters scheduled for hearing in July, 1968	444	38	132	67	49	128	858
b) Hearings held and completed	51	13	13	5	17	15	114
c) Hearings adjourned							
1) At request of appellant	54	8	31	7	13	4	117
2) At request of agency	7	0	2	0	0	0	9
3) Other [d]	22	0	4	1	0	3	30
d) Confirmed withdrawals	138	9	26	33	8	42	256
e) Unconfirmed withdrawals	20	1	5	5	4	20	55
f) Defaults [e]	152	7	51	16	7	44	277
Totals	444	38	132	67	49	128	858
II. Special accommodation hearings for appellants who are unable to appear at regularly scheduled hearings or because of employment or infirmity							
a) Night hearings	1	0	0	0	0	0	1
b) Hearings held in appellants' homes	4	0	1	0	0	0	5
c) Hearings held for appellants in hospitals	0	0	1	0	0	0	1
Totals	5	0	2	0	0	0	7

[d] For administrative reasons, or by direction of Hearing Officer

[e] Neither appellant nor representative appeared at hearing

8. Disposition of Matters by decision after fair hearing (Statewide)

	Adequacy	Discontinuance	Other	Totals
a) Affirmed	30	17	10	57
b) Reversed	3	3	4	10
c) Reversed in part	15	0	1	16
d) Remand	0	0	3	3
e) Miscellaneous	2	0	0	2
Totals	50	20	18	88

9. Time lapse of matters disposed of by decision after fair hearing (Statewide - all issues) f

Time Lapse	No. of Matters
Over 90 days	68
80-89	2
70-79	5
60-69	6
50-59	2
40-49	3
30-39	2
Total	88

10. Decisions without hearing 3

f Beginning with the day of Department's receipt of request for fair hearing

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF AUGUST, 1968

	New York City			Upstate			Totals
		b	c	a	b	c	
1. Matters on hand on July 31, 1968	1146	65	325	281	78	241	2136
2. Requests for hearings in August, 1968	360	26	102	179	48	156	871
3. Total matters in office in August, 1968	1506	91	427	460	126	397	3007
4. Matters closed in August, 1968							
a) By decision	55	8	6	14	5	14	102
b) By withdrawal	231	17	21	44	28	54	395
c) By abandonment	81	9	28	23	5	35	181
d) By duplication	0	0	0	0	1	0	1
Totals	367	34	55	81	39	103	679
5. Matters pending in office on August 31, 1968	1139	57	372	379	87	294	2328
a) Decisions in process	111	15	72	49	19	48	314
b) Hearings scheduled	477	39	98	52	13	51	730
c) Hearings to be scheduled	382	0	133	229	1	28	773
d) Abandonments and withdrawals in process of being confirmed	169	3	69	49	54	167	511
Totals	1139	57	372	379	87	294	2328

a Adequacy issues
b Discontinuance or suspension issues
c Denial, failure to act, miscellaneous

	New York City			Upstate			Totals
	a	b	c	a	b	c	
6. Calendar action in month of August, 1968							
a) Matters scheduled for hearing in August, 1968	499	24	140	77	34	119	893
b) Hearings held and completed	41	9	40	15	6	18	129
c) Hearings adjourned							
1) At request of appellant	44	6	22	19	2	9	102
2) At request of agency	3	1	1	0	1	2	8
3) Other [d]	20	0	0	3	0	1	24
d) Confirmed withdrawals	185	3	27	23	18	36	292
e) Unconfirmed withdrawals	11	0	0	0	0	4	15
f) Defaults [e]	195	5	50	17	7	49	323
Totals	499	24	140	77	34	119	893
Special accommodation hearings for appellants who are unable to appear at regularly scheduled hearings or because of employment or infirmity							
a) Night hearings	0	0	0	0	0	0	0
b) Hearings held in appellants' homes	1	1	3	0	0	1	6
c) Hearings held for appellants in hospitals	0	0	0	0	1	0	1
Totals	1	1	3	0	1	1	7

[d] For administrative reasons, or by direction of Hearing Officers

[e] Neither appellant nor representative appeared at hearing

8. Disposition of Matters by decision after fair hearing (Statewide)

	Adequacy	Discontinuance	Other	Totals
a) Affirmed	50	15	8	73
b) Reversed	5	3	1	9
c) Reversed in part	9	0	0	9
d) Remand	3	1	0	4
e) Miscellaneous	2	3	2	7
Totals	69	22	11	102

9. Time lapse of matters disposed of by decision after fair hearing (Statewide - all issues) f

Time Lapse	No. of Matters
Over 90 days	77
80-89 days	5
70-79 days	11
60-69 days	2
50-59 days	2
40-49 days	2
30-39 days	3
Total	102

10. Decisions without hearing 0

f Beginning with the day of Department's receipt of request for fair hearing

Affidavit of Joel H. Sachs in Support of Defendants' Motions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOEL H. SACHS, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants Wyman, Commissioner of the New York State Department of Social Services, Jones, and the New York State Board of Social Welfare. I am fully familiar with the facts and circumstances surrounding this case.

Attached herewith are copies of the Fair Hearing Reports for the months of September, 1968 and October, 1968 compiled by the New York State Department of Social Services.

Joel H. Sachs

(Sworn to November 19, 1968.)

Exhibit to Sachs Affidavit

Fair Hearing Reports for September and October 1968

(See Opposite ☞)

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF SEPTEMBER, 1968

	New York City			Upstate			Totals
	a	b	c	a	b	c	
1. Matters on hand on August 31, 1968	1139	57	372	379	87	294	2328
2. Requests for hearings in September 1968	2728	43	87	129	14	89	3090
3. Total matters in office in September 1968	3867	100	459	508	101	383	5418
4. Matters closed in September, 1968							
a) By decision	27	4	2	3	4	5	45
b) By withdrawal	196	0	17	64	16	97	390
c) By abandonment	72	0	5	17	8	44	146
Totals	295	4	24	84	28	146	581
5. Matters pending in office on September 30, 1968	3572	96	435	424	73	237	4837
a) Decisions in process	132	19	113	127	30	34	455
b) Hearings scheduled	264	58	96	81	21	59	579
c) Hearings to be scheduled	3039	6	123	167	9	113	3457
d) Abandonments and withdrawals in process of being confirmed	137	13	103	49	13	31	346
Totals	3572	96	435	424	73	237	4837

a Adequacy issues
b Discontinuance or suspension issues
c Denial, failure to act, miscellaneous

	New York City			Upstate			Totals
	a	b	c	a	b	c	
6. Calendar action in month of September 1968							
a) Matters scheduled for hearing in September 1968	560	42	151	112	27	114	1006
b) Hearings held and completed	89	17	32	15	8	18	179
c) Hearings adjourned							
1) At request of appellant	121	17	78	28	3	0	255
2) At request of agency	3	0	4	1	0	0	8
3) Other [d]	0	0	0	0	0	1	1
d) Confirmed withdrawals	161	1	21	38	11	52	284
e) Unconfirmed withdrawals	3	0	0	10	0	7	20
f) Defaults [e]	183	7	16	20	5	28	259
Totals	560	42	151	112	27	114	1006
7. Special accommodation hearings for appellants who are unable to appear at regularly scheduled hearings or because of employment or infirmity							
a) Night hearings	0	0	0	0	0	0	0
b) Hearings held in appellants' homes	0	2	4	0	0	0	6
c) Hearings held for appellants in hospitals	0	0	0	0	0	0	0
Totals	0	2	4	0	0	0	6

d For admininstrative reasons, or by direction of hearing officer

e Neither appellant nor representative appeared at hearing

8. Disposition of Matters by decision after fair hearing (Statewide)

	Adequacy	Discontinuance	Other	Totals
a) Affirmed	21	7	6	34
b) Reversed	3	0	1	4
c) Reversed in part	3	0	0	3
d) Remand	2	0	0	2
e) Miscellaneous	1	1	0	2
Totals	30	8	7	45 *

* In addition there were 130 decisions being typed in final form at end of September.

9. Time lapse of matters disposed of by decision after fair hearing (Statewide - all issues) f

Time Lapse	No. of Matters
Over 90 days	36
80-89 days	6
70-79 days	0
60-69 days	1
50-59 days	1
40-49 days	1
Total	45

10. Decisions without hearing 0

f Beginning with the day of Department's receipt of request for fair hearing

* These 130 decisions were completed, signed and transmitted by October 11, 1968.

STATE DEPARTMENT OF SOCIAL SERVICES

ALBANY, NEW YORK

OFFICE OF COUNSEL

FAIR HEARING REPORT FOR MONTH OF OCTOBER, 1968

	New York City			Upstate			Totals
	a	b	c	a	b	c	
1. Matters on hand on September 30, 1968	3572	96	435	424	73	237	4837
2. Requests for hearings in October 1968	835	52	76	183	58	196	1400
3. Total matters in office in October 1968	4407	148	511	607	131	433	6237
4. Matters closed in October 1968							
a) By decision	82	15	26	22	18	34	197
b) By withdrawal	147	27	66	61	11	19	331
c) By abandonment	21	14	11	56	28	32	162
Totals	250	56	103	139	57	85	690
5. Matters pending in office on October 31, 1968	4157	92	408	468	74	348	5547
a) Decisions in process	218	12	31	42	17	35	355
b) Hearings scheduled	789	38	109	71	32	43	1082
c) Hearings to be scheduled	3069	16	151	303	16	187	3742
d) Abandonments and withdrawals in process of being confirmed	81	26	117	52	9	83	368
Totals	4157	92	408	468	74	348	5547

a Adequacy issues
b Discontinuance or suspension issues
c Denial, failure to act, miscellaneous

	New York City			Upstate			Totals
	a	b	c	a	b	c	
6. Calendar action in month of October 1968							
a) Matters scheduled for hearing in October 1968	618	89	177	166	76	108	1244
b) Hearings held and completed	163	23	39	42	18	21	306
c) Hearings adjourned							
1) At request of appellant	101	14	41	32	5	13	206
2) At request of agency	7	1	0	2	1	4	15
3) Other[d]	41	1	2	2	0	0	46
d) Confirmed withdrawals	108	21	45	49	25	39	287
e) Unconfirmed withdrawals	2	0	2	28	10	20	62
f) Defaults[e]	196	29	48	11	17	21	322
Totals	618	89	177	166	76	118	1244
7. Special accommodation hearings for appellants who are unable to appear at regularly scheduled hearings or because of employment or infirmity							
a) Night hearings	0	1	0	0	0	0	1
b) Hearings held in appellants' homes	0	2	6	0	0	0	8
c) Hearings held for appellants in hospitals	0	0	0	0	0	0	0
Totals	0	3	6	0	0	0	9

d For administrative reasons, by direction of hearing officer, or because of holiday in New York City on October 11, 1968

e Neither appellant nor representative appeared at hearing

8. Disposition of Matters by decision after fair hearing (Statewide)

	Adequacy	Discontinuance	Other	Totals
a) Affirmed	63	26	42	131
b) Reversed	3	3	6	12
c) Reversed in part	5	0	0	5
d) Remand	20	2	6	28
e) Miscellaneous	13	2	6	21
Totals	104	33	60	197

9. Time lapse of matters disposed of by decision after fair hearing (Statewide - all issues)[1]

Time Lapse	No. of Matters
Over 90 days	162
80-89 days	9
70-79 days	3
60-69 days	10
50-59 days	7
40-49 days	4
30-39 days	2
Total	197

10. Decisions without hearing 0

[1] Beginning with the day of Department's receipt of request for fair hearing

Decision After Fair Hearing in the Case of Angeline Velez

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

ANGELINE VELEZ

from a determination by the New York City Department of Social Services (hereinafter called the agency)

A fair hearing was held at 117 Liberty Street, New York City on June 6, 1968, before Wm. J. Carr, Referee at which the appellant, the appellant's representative and representatives of the local agency appeared. The appeal is from a determination by the local agency relating to the discontinuance of a grant of Aid to Dependent Children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

1) The appellant resided at 251 Broadway, Brooklyn, New York until shortly prior to the commencement of this hearing with her four children Annette, age six, Anthony, age five, David, age two, and Steven, age one.

2) She had been receiving a grant of Aid to Dependent Children from January 1964, when her husband, Sergie, left her until May, 1968 when the agency suspended her grant. The appellant received $20 per week for support of the

children from her husband until April, 1968 and $30 per week thereafter pursuant to an agreement reached with the aid of the Family Court.

3) On March 7, 1968, the agency received information from the appellant's landlady that the appellant's husband came home to appellant every night and left every morning. Based on this information, the agency suspended appellant's grant on the ground that since the husband had a sufficient income to support the family and, if he was living home, then the family's needs were being met. On April 30, 1968, after a check with the Post Office Department disclosed that appellant's husband received mail at his wife's address, the agency discontinued appellant's grant of Aid to Dependent Children and closed the case.

4) After her grant of supplemental assistance was discontinued, the appellant and her children were evicted from 351 Broadway for non-payment of rent and now reside at her sister's apartment together with her sister's nine children.

5) The husband does not live with his wife and children and never resided at 351 Broadway, Brooklyn. He does visit his wife and children every Wednesday after he finishes work to bring the support money to her and to visit his children pursuant to the agreement reached in Family Court. Appellant's husband also made several night visits after the separation and forced his attentions on his wife. After the last night visit from her husband in 1966, the appellant obtained a Family Court Order of Protection and her husband has not stopped in at night since.

7) The records of two credit companies which extended credit to the appellant's husband disclose his address as other than his wife's address.

8) Appellant's husband is employed and earns $96.40 per week gross and $88.32 per week take home pay. He is contributing $30 per week to the support of his children in accordance with the agreement in the Family Court proceedings.

9) The appellant has incurred debts of $32 for moving expenses and $68 for food as the result of the agency action in discontinuing her grant, and she has need for a grant of assistance.

The agency has submitted no evidence that appellant's husband is contributing more than the $30 per week of which the agency is aware or that he is willing to contribute any more. The only evidence adduced by the agency to indicate that Sergio Velez resided with his wife is the hearsay evidence as to what the landlady reported. This is overcome by the sworn testimony of appellant, appellant's husband, appellant's neighbor and appellant's sister as well as other credible evidence.

Decision

The determination of the agency is reversed. The agency is directed to reinstate assistance to the appellant, and

to provide special grants for the debts incurred as a result of the agency action. The agency is further directed to report its action to the Area 6 Office of the State Department of Social Services pursuant to this decision, in accordance with Section 84.19 of the Rules of the State Board of Social Welfare.

Dated: Albany, New York
July 10, 1968

George K. Wyman
Commissioner

Opinion of Three-Judge District Court

Before FEINBERG, Circuit Judge, BRYAN and MCLEAN, District Judges.

FEINBERG, Circuit Judge:

These consolidated actions present another in the increasing number of attacks on prevailing state welfare practices.[1] Plaintiffs claim that the procedures in New York State for termination of welfare benefits deny due process and violate both the Social Security Act and regulations of the United States Department of Health, Education, and Welfare (HEW). The eight plaintiffs (six in one action, two in the other) are New York City welfare recipients; their complaints sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, 42 U.S.C. §1983, and the Social Security Act, 42 U.S.C. §§301 et seq. Defendants are the Commissioner of the New York State Department of Social Services, the State Board of Social Welfare and the Commissioner of the New York City Department of Social Services. In May 1968, over the objections of defendants, Judge Bryan convened a three-judge court pursuant to 28 U.S.C. §§2281, 284. 294 F.Supp. 887 (S.D.N.Y.1968). Thereafter, a briefing schedule was fixed and hearings were held in June and July on a number of motions. Because of the interest of the United States in the monies expended under the New York State and City welfare programs and in the procedures set up to administer them, the court invited the United States to submit an amicus brief, which it did in early October 1968. For reasons hereafter

1. See, e.g., King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); Thompson v. Shapiro, 270 F.Supp. 331 (D. Conn. 1967), argued, 36 U.S.L.W. 3425 (U.S. May 7, 1968), reargued, 37 U.S.L.W. 3157 (U.S. Oct. 29, 1968), (No. 813, 1967 Term; renumbered No. 9, 1968 Term); Parrish v. Civil Serv. Comm'n, 66 Cal.2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967).

indicated, we grant plaintiffs' motion for a preliminary injunction in part and deny it in part, and deny defendants' motion for summary judgment; the disposition of other motions is set forth in detail below.

I

Welfare programs in the United States generally fall into two groups: general assistance and categorical assistance.[2] The former is financed only by state and local governments; the latter refers to programs supported by grants from the federal government under the Social Security Act to give aid to particular categories of individuals, e.g., aid to families with dependent children (AFDC). Four of the original plaintiffs in this action[3] were recipients of general assistance, home relief under the New York Social Welfare Law. The other four[4] were recipients of AFDC, which New York State administers in accordance with the Social Sceurity Act, 42 U.S.C. §§601–609. Funds of the United States are involved only in the latter program.

It is instructive on the state of administration of public welfare to review how both federal and New York State and City regulations have changed just since the institution of this consolidated action. At the time the complaints were filed, state regulations dealing with both home relief and AFDC programs apparently required no *prior* notice at all of suspension of benefits and no hearing *prior* to that action. However, a state hearing procedure, which is designated as a "fair hearing," had been instituted to pro-

2. See Note, Federal Judicial Review of State Welfare Practices, 67 Colum.L.Rev. 84 (1967).

3. John Kelly, Randolph Young, Juan DeJesus and Ruby Sheafe.

4. Pearl McKinney, Pearl Frye, Altagracia Guzman and Esther Lett. Twelve additional plaintiffs also sought to intervene. Of these, 10 were also in the AFDC program, and 2 received home relief only.

vide an administrative remedy *after* suspension or termination of benefits; in the case of home relief, the procedure went into effect barely two weeks before the first complaint was filed in this case. After the action began, the State Department of Social Services amended its regulations, effective March 1, 1968, to provide notice and an "administrative hearing" *before* termination of public assistance. Thereafter, apparently because the New York City Department of Social Services felt that it could not feasibly comply with that regulation, it was repealed, and a new regulation was adopted. Under it, welfare departments may choose one of two options described below, both of which continue to provide notice and a type of hearing before cessation of benefits. Subsequent to the State amendments, HEW adopted a new criterion for the administration of state plans, effective July 1, 1968, which requires that the agency:

> Gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance.

Handbook of Public Assistance Administration, Part IV, §2300(d) (5) (1968) ("Handbook").

The remedies for a welfare recipient who has been wrongfully suspended or terminated have also been changed in another significant respect. At the time the suit was commenced, New York granted a reinstated recipient retroactive benefits for only two months and then only to the extent of debts for necessities which had been incurred.[5] Since the delay between wrongful termination of benefits and subsequent reinstatement often exceeded two months, the limit on retroactivity worked hardship. However, effec-

5. See 18 NYCRR 325.5(n) (5) (superseded 1968).

tive July 1, 1968, pursuant to a change in regulations issued by HEW, payments are now made fully retroactive and are not confined to reimbursement for debts incurred.[6]

As a result of these changes, welfare recipients in New York State now have a two-step procedure to protect them against allegedly wrongful termination or suspension of benefits. The first, or pre-termination procedure, depends upon which of two options the local welfare agency has adopted. We are advised that in New York State, option (a) is in effect everywhere but in New York City, which has chosen to follow option (b). Both options are set forth in the margin.[7] Under option (a), the local agency

6. See Handbook, Part IV, §§6200(k), 6300(g) (1968); 18 NYCRR 325.5(n) (6), as amended (Order of New York State Dept. of Social Services, June 28, 1968).

7. Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or

must give seven days written notice, specifying the reasons for suspension, before aid is stopped. The recipient is entitled to appear before an official, who is superior to the one who approved the suspension, and can present oral

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other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law. Board rules, Department regulations and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any, of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution

and written evidence with the aid of an attorney or other representative. Option (b), adopted by New York City, offers less procedural protection; e. g., although the notice provision is the same, the welfare recipient is entitled to submit a statement in writing to demonstrate why aid should continue. Under either option, if the recipient is unsuccessful, benefits cease. Thereafter, the terminated recipient is entitled to the second step, the so-called state "fair hearing,"[8] which spells out significant procedural rights and is a trial-type proceeding. Thus that hearing

wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

18 NYCRR 351.26.

8. 18 NYCRR 84.2.23.

is before an independent state hearing officer; the complaining recipient has the right of confrontation and cross-examination of the witness against him; and a verbatim record is made of the hearing. The state regulations provide that the state fair hearing is to be held within ten working days of receipt of a request for the hearing, and a decision is to be rendered as soon as feasible, and, in any event, not later than twelve working days from the close of the hearing.[9]

II

Plaintiffs allege that even with the improved procedures, they are threatened with termination of assistance in a manner that is both unconstitutional and improper under the governing statute and regulations. Their constitutional argument is that under the due process clause of the fourteenth amendment they are entitled to a constitutionally adequate hearing before termination of benefits and that the procedures provided by the state and city do not meet this standard. Defendants do not deny plaintiffs' general propositions that the terminations here under attack amount to "state action" and that the protections of the due process clause apply. Nor do defendants attempt to argue that welfare benefits are a "privilege," rather than a right, and that therefore they may fix the procedures of termination as they see fit.[10] However, defendants do claim that the combined hearing procedures now provided to welfare recipients meet constitutional and statutory requirements.

9. We are advised by the amicus brief of the United States that HEW has found that the new state "fair hearing" plan is not acceptable, as it fails to comply with federal standards, see Handbook, Part IV, §§6000-6500 (1968), in several respects, but that New York is in the process of revising the plan to meet federal requirements.

10. Cf. C. Reich, The New Property, 73 Yale L.J. 733 (1964); W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968).

We agree with defendants that the state fair hearing procedure after termination of benefits seems constitutionally sufficient.[11] Defendants argue that combining the post-termination procedure with an informal pre-termination "hearing" disposes of all due process claims, citing principally Wheeler v. Montgomery, —— F.Supp. —— (N.D. Cal. 1968) (three-judge court), appeal docketed, 37 U.S.L.W. 3152 (U.S. Oct. 22, 1968) (No. 634). In that case, as in this, state hearing procedures for termination of welfare changed during the litigation. There, the state provided an "informal conference" before termination and a full hearing procedure within a few months thereafter. The court determined the constitutionality of the former "in light of" the latter and held that the combined procedure complied with due process.[12]

While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. The case of Angela Velez, one of the proposed intervenors, makes the point starkly. She was terminated on March 11, 1968, because her husband allegedly visited her home every night. She requested the post-termination state fair hearing in mid-March. The hearing was held in June, and, pursuant to the request of this court for expedition, the decision issued on July 10. The State Commissioner found that the information that caused suspension of benefits came from Mrs. Velez's landlady, that the information was

11. Although one of the United States' objections to this procedure, see note 9 supra, is that it fails to provide specifically that the hearing officer's decision must be based only upon evidence which is part of the record, for constitutional purposes we would construe the regulations, see 18 NYCRR 84.15(a), to include such a requirement, in accordance with this opinion.

12. Apparently a California state court disagreed with the California federal court. See McCullough v. Terzian, No. 379011 (Cal. Super.Ct., Alameda County, May 1968).

untrue, that the husband does not live with his wife, that she had obtained a court order in 1966 to prevent his night visits, that he is allowed to visit the four small children only on Wednesday, and that at that time he brings his support money of $30 a week, but no more, in accordance with an agreement worked out in Family Court. Accordingly, the State Commissioner directed the local agency to reinstate assistance. However, in the four months between termination of AFDC benefits and the decision reversing the local agency, Mrs. Velez and her four children, ages one to six, were evicted from her apartment for nonpayment of rent and went to live with her sister, who has nine children and is on relief. Mrs. Velez and three children have been sleeping in two single beds in a small room, and the youngest sleeps in a crib in the same room. Thirteen children and two adults have been living in one apartment, and Mrs. Velez states that she has been unable to feed her children adequately, so that they have lost weight and have been ill.

The case of Mrs. Esther Lett, one of the original plaintiffs, is also instructive. According to the affidavits of plaintiff Lett and her Legal Aid Society attorney: She and her four dependents, aged three months to fifteen years, were abruptly terminated from public assistance on February 1, 1968. The purported ground was that she had concealed her current employment by the Board of Education. In fact, she had worked for Operation Head Start in July and August 1967, but had not been employed by the Board of Education after August 20, 1967. Since that date and up to February 1968, she had worked at Day Care Centers on twenty-six different days, earning a total of $300, with the knowledge of the local welfare agency. As a result of termination of assistance, she and her dependents were forced to live on the handouts of neighbors. On February 18, she and her family had to go to the hospital for

severe diarrhea, apparently brought on by the only meal they had had that day—spoiled chicken and rice donated by a neighbor. She applied for emergency aid and a post-termination state "fair hearing" but the aid was refused and the fair hearing was not scheduled. Through the herculian efforts of The Legal Aid Society, including numerous telephone calls and three personal trips to local agencies, it was learned that the Board of Education had apparently made an error. However, the Board would not so inform the welfare agency until it requested a new verification. On Tuesday, February 27, Mrs. Lett went to a local center to seek emergency aid. Because she had not eaten all day, she fainted in the center, but when she awoke she was told that she could not get money for food immediately because it had not yet been authorized. Finally, after waiting eight hours, she was given $15 to feed herself and four dependents and told to return on Friday. After suit was brought, her assistance was apparently temporarily reinstated without prejudice.

We do not know what the truth is with regard to Mrs. Lett's alleged concealment of employment, although on the present record it appears that the termination of benefits was improper.[13] As for Mrs. Velez, it is clear that the decision to terminate her payments was wrong. But the issue is not whether a specific termination was proper, but whether the procedures used were justifiable. There is no need to elaborate with further case histories. Suffice it to say that to cut off a welfare recipient in the face of this kind of "brutal need"[14] without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. Traditionally, such considerations have been

13. Benefits to Mrs. Lett had also been suspended during March 1967; the suspension was found to be improper in a fair hearing decision in November 1967.

14. See Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234, 1244 (1967) ("Yale Note").

urgent in nature and involve the health, safety, or well-being of many individuals. "Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." 1 K. Davis, Administrative Law Treatise ¶ 7.08, at 438 (1958), citing cases where great harm to the public was, or could be, immediately threatened.[15]

We turn then to examine the pressing need here that would justify a departure from the general standard of "the requisite [due process] hearing * * * before the final order becomes effective."[16] Simply stated by defendant New York City Commissioner, it is the "need to protect the public's tax revenues." This is, of course, not only a legitimate, but a necessary, concern of defendants, but the argument requires close analysis. Clearly, the state must see to it that assistance goes only to those who are entitled to it. However, the issue here affects only the continuation of benefits while a claim of ineligibility is disputed. Defendants' asserted justification for the termination procedures now being used is therefore quite narrow. It is the additional cost of providing more elaborate procedures to determine whether the tentative decision to terminate benefits was correct, a cost which may come both from an increase in the number of hearings and from an extension of average time from notice of termination to end of hearing, during which period benefits continue. It is clearly within the power of the state and city to minimize that additional cost by various methods, e. g., by expediting hearings, by increasing the number of hearing officials, by utilizing

15. E. g., Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (mislabeled food products); Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) (summary seizure of savings and loan association by conservator). See also cases cited in Yale Note 1240-41 nn. 26-35.

16. Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-153, 61 S.Ct. 524, 536, 85 L.Ed. 624 (1941).

statutory rights to recover monies paid since the date of ineligibility. Cf. Snell v. Wyman, 281 F.Supp. 853 (S.D.N.Y.), appeal docketed, 393 U.S. 813, 89 S.Ct. 106, 21 L.Ed.2d —— (1968). Moreover, it should be remembered that, insofar as AFDC or other categorical assistance is concerned, federal contributions are available to meet fifty per cent of the cost of benefits paid pending review and the administrative expense of the hearing procedures. See Handbook, Part IV, §6500 (1968).

Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases.[17] The obvious fact is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful termination. The equally obvious remedy is to take greater care to prevent such injustice before it occurs. While the problem of additional expense must be kept in mind,[18] it does not justify denying a hearing meeting the ordinary standards of due process.[19] Under all

17. Thus, it appears from the state wide figures submitted by defendants that in the fair hearings on discontinuance which reached decision from April through August of this year, only 50 of 78 cases, or 64%, were affirmed. Seventeen were reversed in whole, 1 in part, 3 remanded, and 7 received "miscellaneous" dispositions. Later figures for September and October, just submitted by defendants, show a higher percentage of affirmances.

18. It has been noted that "the welfare system is designed to save money instead of people, and tragically ends up doing neither." David Ginsburg, Exec. Dir. Nat'l Advisory Comm'n on Civil Disorders, 23 Record of N.Y.C.B.A. 28 (Supp. 1968), quoting Mitchell Ginsberg, former head of New York City's Department of Welfare.

19. Cf. D. Morris, Welfare Benefits as Property: Requiring a Prior Hearing, 20 Admin.L.Rev. 487, 506 (1968): "The state interest which circumscribes the property interest of a welfare recipient and also affects the type of procedural due process afforded is not the state's interest in its funds, but only whether the funds themselves accord with the aims of society."

the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result.[20] In short, we must focus on the adequacy of the hearing procedures which defendants have provided prior to termination of benefits.

III

Cases dealing with procedural requirements of a hearing before an administrative tribunal are many and varied, involving such diverse administrative actions as discharge from public employment,[21] refusal to license,[22] revocation of security clearance,[23] treatment of aliens,[24] and admission

20. We note, in this context, that the United States indicates that HEW is presently considering adoption of a policy by which assistance would continue until a fair hearing decision was reached in at least some types of termination cases. This consideration, along with the present federal requirement of advance notification and opportunity for discussion, see text preceding note 5 supra, reinforces our expectation that providing adequate prior hearings will not unduly burden the administration of the welfare system.

Of course, we do not suggest that the same procedures are constitutionally requisite in all forms of social security administration. In the operation of the federally-administered Old-Age, Survivors, and Disability Insurance program, for example, the amicus brief indicates that no hearing prior to termination is available as of right. However, as that brief points out, there are far fewer reasons for termination of OASDI benefits than in the AFDC program, and these reasons are based on more objectively ascertainable facts. In OASDI the circumstantial changes on which termination is based are nearly always reported or confirmed by the recipient himself, and the likelihood of severe hardship resulting from erroneous termination is certainly not as great as in the welfare programs here in issue.

21. Slochower v. Board of Higher Educ., 350 U.S. 551, 554, 76 S.Ct. 637, 100 L.Ed. 692 (1956); cf. Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

22. Bratton v. Chandler, 260 U.S. 110, 43 S.Ct. 43, 67 L.Ed. 157 (1922); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

23. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1958).

24. Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953).

to the bar,[25] to name only a few. Before considering plaintiffs' formidable list of objections to the pre-termination hearing procedures afforded welfare recipients, some observation based upon these and related cases may be in order.

1. It is impossible to define rigidly what constitutes procedural due process for all purposes. "[D]ue process of law has never been a term of fixed and invariable content." FCC v. WJR, 337 U.S. 265, 275, 69 S.Ct. 1097, 1103, 93 L.Ed. 1353 (1949). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. * * * [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right to obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L.Ed.2d 1307 (1960).

2. While it is a well established principle that courts should not decide issues of procedural deficiency on con-

25. Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). See also Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926).

stitutional grounds if any other avenues of decision are open, see Greene v. McElroy, 360 U.S. 474, 509, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (concurring opinion); Ashwander v. TVA, 297 U.S. 288, 346-347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion), we believe that the constitutional issue must be faced here. It is true that plaintiffs not only invoke due process but also rely on the requirement of the Social Security Act, 42 U.S.C. §602(a)(4) that:

> A State plan for aid and services to needy families with children must * * * (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness * * *.[26]

By interpreting the statutory phrase "fair hearing" in the context of pretermination procedures,[27] we might have avoided the constitutional questions. See Greene v. McElroy, 360 U.S. 474, 496-497, 507-508, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959). However, the command of the federal statute does not apply to state and local general assistance for which no federal funds are provided. Six of the original and intervening plaintiffs[28] receive such assistance only; as to them the constitutional issue is squarely posed.

3. We must thus decide what specific procedural safeguards are constitutionally required for welfare recipients in a pre-termination proceeding. While the Supreme Court has been solicitous to assure "traditional forms of fair procedure" in administrative hearings,

26. Cf. 42 U.S.C. §§302(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).

27. See recent HEW regulation quoted in text preceding note 5 supra.

28. See notes 3, 4 supra and accompanying text.

Greene v. McElroy, supra, 360 U.S. at 508, 79 S.Ct. 1400, we do not believe that every person directly affected by administrative action must be afforded all of the procedural rights guaranteed in a full-fledged judicial trial. See e. g., Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); cf. Hyser v. Reed, 318 U.S. 957, 84 S.Ct. 446, 11 L.Ed.2d 315 (1963). Rather, we are called upon to determine what minimum procedural safeguards are required here in the context of the welfare system.

IV

We turn first to the procedures provided under option (b) which is in effect in New York City. Option (b) provides for notice of "proposed discontinuance or suspension * * * together with the reasons for the intended action," and allows the recipient in response only to "submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued * * *." The option does not envisage a personal appearance.

A hearing on a proposed termination of welfare benefits is, of course, a classic instance of determination of what have been called "adjudicative facts—facts pertaining to a particular party." 1 K. Davis, Administrative Law Treatise ¶ 7.20, at 506 (1958). If the right to a hearing in this context, fairly construed, means anything, it is literally the right to be heard. This is hardly a novel idea. In Londoner v. Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908), the Supreme Court specifically rejected the notion that permission to submit objections in writing comported with due process, and concluded that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."

210 U.S. at 386, 28 S.Ct. at 714. See also Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117, 123, 46 S.Ct. 215, 70 L.Ed. 494 (1926). We do not deal here with the issue whether procedural due process requires the right to oral argument on a matter of law. See FCC v. WJR, 337 U.S. 265, 276, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949). We have the different question whether a welfare recipient has the right to appear in person before the welfare agency to present his case. On an issue of such immediate and crucial impact as termination of welfare benefits, we conclude that the right to be heard means the right to be heard in person. Defendants cite to us Morgan v. United States, 298 U.S. 468, 481, 56 S.Ct. 906, 80 L.Ed. 1288 (1936), and Boston & Maine R. R. v. United States, 208 F. Supp. 661 (D.Mass.), aff'd mem., 371 U.S. 26, 83 S.Ct. 117, 9 L.Ed.2d 95 (1962). It is true that *Morgan* contained the dictum that "[a]rgument may be oral or written," 298 U.S. at 481, 56 S.Ct. at 912, but we do not take that to mean that in this case there is no constitutional right to present evidence, as opposed to argument, in person. Moreover, the case is clearly distinguishable on its facts.[29] In *Boston & Maine,* plaintiffs had had "a full opportunity to present their defense by oral and documentary evidence." 208 F.Supp. at 667.

Not only is the right to a personal appearance ordinarily implicit in the constitutional concept of a fair hearing, but the reality of the status of many welfare recipients makes the invitation to submit their cases in writing cruelly ironic. The burden of marshalling and writing down persuasive arguments in opposition to frequently vague or

29. *Morgan* was a challenge to administrative rate making; plaintiffs had had the opportunity to present oral argument on evidence before the agency in question; and the holding of the case was that decision could not be made by an officer who had not considered the evidence or argument. As to the subsequent treatment of *Morgan*, see W. Gellhorn & C. Byse, Administrative Law 1086-89 (4th ed. 1960).

cryptic charges would discourage even a relatively well-educated layman. In fact, many welfare recipients clearly lack the education or sophistication either to understand the reason for their proposed termination or to prepare an adequate written defense.[30] Moreover, a review of the cases of the individual plaintiffs in this action is persuasive that many of the disputes as to eligibility could have been easily resolved between the recipient and the welfare official supervising the case. In the case of Mrs. Lett, for instance,[31] a conference about the facts of her employment with an impartial official might have quickly cleared up the misunderstanding and prevented the severe hardships that she suffered. Certainly the give and take of an informal hearing would be more likely to produce a just disposition than an attempt on her part to furnish a written rebuttal of her alleged "failure to disclose assets."

Even if the majority of welfare recipients were educationally equipped to write a clear statement of the reasons why they should not be terminated, the very summary form of notice of proposed terminations makes an intelligent reply difficult.[32] Not only are the reasons given often incomprehensibly vague, but additional or wholly different reasons may in fact be behind the decision to terminate.[33]

30. A recent study has established that only 57% of the mothers on welfare in New York City had attended high school at all; that only 1 of 6 had graduated; and that 1 of 6 had not even gone beyond fourth grade. See I. Cox, Families on Welfare in New York City, 6 Welfare in Review 22, 24 (1968).

31. See text preceding note 13 supra.

32. The charge of "failure to comply with Department resource policy" made to intervenor-plaintiff Sidor, for example, is virtually impossible to disprove without further information.

33. The cryptic notice given intervenor-plaintiff Soto, for example, was "failure to attend rehabilitation C.O.C." The decision of the review officer however refers to quite different reasons—that Mr. Soto took drugs, was reported to be "a parasite" and "playing a game," and had frequently failed to cooperate.

A personal hearing is necessary, if the recipient wishes it, both to explain to him the nature of the charges against him and to inform him of the evidence on which they are based. Indeed, the next most glaring deficiency of option (b) is its failure to require disclosure to the recipient of the real basis of the case against him. It merely provides for notice of proposed discontinuance "together with the reasons for the intended action." This procedure clearly falls far short of giving the recipient sufficient notice of the case against him so that he may ascertain its basis and contest it effectively. In Willner v. Committee on Character and Fitness, 378 U.S. 96, 107, 83 S.Ct. 1175, 1182, 10 L.Ed.2d 224 (1963), the concurring opinion of Justices Goldberg, Brennan and Stewart states:

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence.

At least seven, if not all,[34] of the Justices agreed with this statement.

The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully

34. The dissenting opinion (Harlan, J., joined in by Clark, J.) held that the petition for certiorari should have been dismissed as improvidently granted, but characterized as "questionable" any holding that "an applicant for membership in the New York Bar may be denied admission without having had the opportunity at any stage to confront persons whose unfavorable information may have led the Character Committee to refuse to certify the candidate's 'character and fitness.'" 373 U.S. at 110, 83 S.Ct. at 1183.

informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[35] Moreover, in some instances at least, he must be permitted to meet the evidence against him by having questions put to the source of that evidence. There have been cited to us too many case histories in which welfare recipients have allegedly been cut off on the basis of untrue rumors and reports, as with Mrs. Velez, discussed above. We do not hold that the welfare recipient about to be terminated must be accorded the opportunity for confrontation and cross-examination in a formal manner, with the full panoply of a trial-type hearing, including testimony under oath. The right to face those providing harmful information and have them interrogated may be substantially achieved in an informal way, and we use the term "cross-examination" here in that less formal sense. Moreover, we are aware that such a requirement is time-consuming and if applied indiscriminately in every case might unduly delay administration of the entire welfare system. There will undoubtedly be many cases—perhaps a great many—in which the material relied upon by the welfare agency "appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant * * *." Willner v. Committee on Character and Fitness, 373 U.S. 96, 108, 83 S.Ct. 1175, 1182, 10 L.Ed.2d 224 (1963) (concurring opinion).[36] But where termination of

35. See Bratton v. Chandler, 260 U.S. 110, 43 S.Ct. 43, 67 L.Ed. 157 (1922); Gonzales v. United States, 348 U.S. 407, 415, 75 S.Ct. 409, 99 L.Ed. 467 (1955); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); Parker v. Lester, 227 F.2d 708, 716-717 (9th Cir. 1955).

36. Intervenor-plaintiff Fuentes, for instance, was given notice of termination because "You have a large sum of money in the bank for which you were unable to give a satisfactory explanation." In such a case, an official statement from the bank would ordinarily be adequate to support the agency's claim. Again the issue may be simply the proper application of agency regulations to an undisputed factual situation.

benefits "depends upon information supplied by a particular person whose reliance or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded." Id.[37] It may be that something less would be appropriate in such a case if the welfare authorities could show an important interest in secrecy, cf. McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), but no such interest has been demonstrated in any of the cases before us. We assume that any such situation would be the rare exception to be justified on the particular facts involved. We do not suggest that a "tip" or other confidential information may not properly trigger an investigation of a welfare recipient's eligibility. We hold only that when the decision is made to terminate benefits, the recipient must be afforded an opportunity to learn the evidence against him which the investigation turned up, if it was a basis of that decision, and when the value of that evidence turns upon a person's credibility, the recipient must have the opportunity to test it as set forth above. We realize that these requirements will duplicate the "fair hearing" post-termination procedure to some extent. However, any pre-termination hearing—even the type already put into effect by the state —also does that. Undue duplication is of course regrettable. However, we regard the informal conference envisioned here as quite different from a full-fledged trial-type post-termination "fair hearing" with testimony given under oath. In any event, in light of the shattering effect

37. See Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Gonzalez v. Freeman, 118 U.S. App. D.C. 180, 334 F.2d 570, 578-580 (D.C.Cir.1964); Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); Rios v. Hackney, 294 F.Supp. 885 (N.D.Tex. 1967). But cf. Brown v. Gamage, 126 U.S.App. D.C. 269, 377 F.2d 154 (D.C.Cir.), cert. denied, 389 U.S. 858, 88 S.Ct. 103, 19 L.Ed.2d 125 (1967), criticized in 20 Stan.L.Rev. 360 (1968).

of wrongful termination of benefits upon a recipient, we believe that the procedures called for here are minimum requirements of due process.

Accordingly, therefore, we conclude that option (b) is constitutionally inadequate and that plaintiffs' application for a preliminary injunction against the use of the option in New York City must be granted. However, because argument has also been addressed to the legal sufficiency of the provisions of option (a) and because New York will be faced under our ruling with the need to substitute for option (b), we feel it is our obligation also to consider the constitutionality of procedures under option (a).

That option states that the notice of proposed termination shall advise the recipient that if he makes a request for review he will be afforded:

> opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, • • •

and at such a review, the designated welfare official shall:

> review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made.[38]

This language makes clear that option (a) does not suffer from some of the obvious inadequacies of option (b). Thus, option (a) does provide for a hearing in person, and, fairly construed, for disclosure to the recipient of the evidence against him. It is not clear whether the source of the evidence must be identified and the recipient there-

38. See note 7 supra.

after given the right, in an appropriate case, to confront a person so disclosed and have him questioned. The regulation's silence on this point, when compared with the specificity of the state hearing procedure provided after termination,[39] might indicate that the recipient is denied such right. We have already ruled that this would be constitutionally invalid. Therefore, unless option (a) is construed to afford a recipient such right in an appropriate case, the procedure is improper. But in view of the newness of the regulation and the paucity of information given us on its use outside of New York City, we will not assume at this time that the right will be denied.

Plaintiffs have other objections to option (a), but to the extent that they have not already been dealt with, they do not require extensive discussion.[40] Implicit in what we have already said is the requirement that the decision of the reviewing official must be based solely on evidence before him which has been made available to the recipient, except in the rare instance already discussed when there is an important interest in secrecy.[41] An objection is made to the notice requirement, but it is not persuasive. Option (a) requires notice in writing "at least 7 days prior to the proposed effective date of the discontinuance." We construe this to mean that the notice must be

39. "Each party has a right to be represented by counsel, or other representative, to testify, to produce witnesses to testify, to offer documentary evidence, to cross-examine opposing witnesses, to offer evidence in rebuttal and to examine any documentary evidence offered by the other party." 18 NYCRR 84.13(c).

40. HEW is apparently seeking clarification at this time from the New York Welfare Department on the grounds that the New York prior review procedure is not expressly available in cases of reduction of benefits as well as termination, as is required by the Handbook, Part IV, §2300 (d) (5) (1968). Since plaintiffs have not raised this issue, we do not consider it here.

41. See text following note 37 supra.

mailed at least seven days before such effective date. If so mailed, the notice is adequate.

The final objection to option (a) as written is that the welfare official reviewing the proposed termination of benefits is not impartial. Option (a) provides that:

> Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review.

This is obviously an attempt to have "review" of a supervisor's decision to terminate by someone more disinterested than he is. Since the review, however, is by another employee of the welfare agency, there is a possibility that the reviewing official will have had some prior official contact with the case. However, we are unable to say that the possible involvement of that official in aspects of a case prior to the review of proposed termination necessarily disqualifies him from conducting a fair hearing. Some degree of previous familiarity and informal contact with a case by a hearing officer is a common phenomenon in many administrative agencies. That the review officer is familiar with, or even has formulated opinions about, the facts of a case prior to review is not in itself sufficient to disqualify him.[42] However, plaintiffs argue that this reviewing officer is in practice frequently a case supervisor who has been consulted in advance for approval of proposed terminations and may even have initiated the recommendation to ter-

42. See NLRB v. Donnelly Garment Co., 330 U.S. 219, 236-237, 67 S.Ct. 756, 765, 91 L.Ed. 854 (1947): "We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." See also Pangburn v. CAB, 311 F.2d 349, 356-358 (1st Cir. 1962); 2 K. Davis, Administrative Law Treatise ¶12.06, at 169 (1958); W. Gellhorn & C. Byse, Administrative Law 944-45 (4th ed. 1960).

minate. We would regard such a practice as a clear violation of the spirit of the requirement that the reviewing officer be superior to "the supervisor who approved the proposed discontinuance." In other words, the regulation meets the requirement of a fair hearing, but we expect the welfare department to enforce it strictly.[43]

In addition to their allegations of the insufficiency of the New York hearing procedures on their face, plaintiffs complain that the regulations themselves are frequently disregarded or improperly applied. They have offered evidence showing, for instance, that the notice often is not sent out within seven days of the proposed termination or before termination at all, that notices fail to state the full or real reasons for proposed termination, and that the review decision is frequently delayed unduly. We recognize that the transition to a new system of procedures, especially in an agency as large as the New York City Welfare Department, is not an easy task, and that it necessarily takes time to achieve full and smooth operation. Moreover, we are confident that the agency will make every effort in the future to insure that its own regulations and the requirements outlined in this opinion are carefully observed in practice. Finally, we are well aware that proceedings to compel state officials to comply with their statutory or regulatory duties should usually be brought in state courts,[44] and that supervision of a state administrative program is ordinarily an inappropriate role for a three-judge federal court. In view of all of these considerations and the fact that the plaintiffs before us are ob-

43. We also assume that a case supervisor who has become too deeply involved in a case conscientiously to undertake an impartial review can and will disqualify himself from that function.

44. For instance, in an Article 78 proceeding in New York, N.Y.C.P.L.R. §§7801-7806.

taining an injunction against use of option (b), the procedure which has been applicable to their terminations up to now, we will not now deal with these issues further.

V

With this disposition of the case, it is unnecessary to rule on plaintiffs' remaining statutory argument that by providing two options throughout the state for pre-termination procedure, the state violates the requirement of 42 U.S.C. §602(a) (1), that its plan, in effect, be uniform in the state. Apparently, defendants do not press before us various other arguments originally made before Judge Bryan, such as plaintiffs' need to exhaust available remedies administratively, or that the case is moot because most plaintiffs are now receiving public assistance on an emergency basis, or that a three-judge court is inappropriate here. Judge Bryan rejected these arguments in his opinion convening the three-judge court. 294 F.Supp. at 887.

As to the first argument, see King v. Smith, 392 U.S. 309, 312 n. 4, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). As to the second argument, the only development since Judge Bryan's decision is that some of these plaintiffs have received their post-termination state fair hearings. However, that this right was finally accorded to them months after their complaint was filed and after termination of benefits does not dispose of the case. Other plaintiffs are still threatened with termination without a proper hearing, and if we were required to do so, we would regard this as a class action, as plaintiffs request, as was done in Wheeler v. Montgomery, No. 48303 (N.D.Cal. April 17, 1968), appeal docketed, 37 U.S.L.W. 3152 (U.S. Oct. 22, 1968) (No. 634), relied on by defendants. Finally, Judge Bryan properly convened the three-judge court. The com-

plaint obviously raised substantial constitutional issues. In addition, while option (b) may thus far have actually been in effect only in New York City, any or all local agencies could adopt it; it is thus validly a regulation of "general and state wide application." Moody v. Flowers, 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967).

Finally, we emphasize again that we deal here only with procedural rights, not with whether a particular recipient of welfare is entitled to receive it. We are most aware that abuses of the welfare system do exist, and we do not minimize the need to keep welfare expense within manageable bounds. We do not suggest that welfare payments should be made to anyone not entitled to receive them. We hold only that a welfare recipient is entitled to certain minimum procedural protections before his payments are cut off or diminished. Providing those protections will, of course, help to insure fair individual treatment. In addition, it will have the more subtle, but equally important, effect of demonstrating that fair procedures are available, thus protecting the rule of law in society, a not insignificant result.[45]

To sum up: We hold that a pre-termination hearing for welfare recipients is constitutionally required and that the procedures set forth above for such hearings are the constitutional minimum. Accordingly, we deny defendants' motion for summary judgment; we grant plaintiffs' motion for a preliminary injunction as to the operation of option (b), and deny it as to option (a), for the reasons and on the conditions stated herein. In addition, nothing herein is meant to affect the right to a post-termination hearing in accordance with the procedures already in existence. Plaintiffs also moved to dissolve an order of Judge Bryan's

45. See E. Wickenden, Administration of Welfare Rights, in National Conference on Law and Poverty, Proceedings 31, 36-37 (1965).

staying discovery pending disposition of the motions in chief. Since that discovery was primarily designed to prove that various hearing procedures, even if constitutional on their face, were unconstitutional in their application, for the reasons already set forth we deny it. Plaintiffs' motion to amend the complaint in the consolidated case is granted, as is the motion of the twelve intervenors to intervene.

Settle order on notice; if defendants desire a stay pending appellate review, their proposed order should so provide.

Order of Three Judge Court

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

The plaintiffs in these consolidated causes having moved this court for (1) a preliminary injunction staying the operation of 18 N.Y.C.R.R. 351.26(a) and (b), (2) an order dissolving the stay of discovery proceedings previously entered by the Honorable Frederick van Pelt Bryan, District Judge, (3) an order permitting them to amend the complaint in the consolidated case, and (4) an order permitting them to add twelve intervenor-plaintiffs in the action, and the defendants having moved this court for summary judgment, and these motions having been considered by this court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, and the United States as amicus, and the hearings held to date, and the opinion of this court dated November 26, 1968, and this court having found in said opinion that discontinuance of public assistance benefits without the opportunity for a prior hearing meeting the due process standards spelled out therein causes irreparable injury to recipients of public assistance wrongfully terminated and is a violation of the rights secured to them by the fourteenth amendment to the Constitution of the United States, it is

Ordered, Adjudged and Decreed that

1. Pending further order of this court or termination of this action, defendants and their officers, employees and

agents are hereby enjoined and restrained from directly or indirectly discontinuing, or notifying recipients of an intent to discontinue, financial assistance pursuant to the state's public assistance programs in the manner prescribed by 18 N.Y.C.R.R. 351.26(b).

2. Plaintiffs' motion for a preliminary injunction staying the operation of 18 N.Y.C.R.R. 351.26(a) is denied, on the condition that 18 N.Y.C.R.R. 351.26(a) be construed to require, with respect to discontinuing, or notifying recipients of an intent to discontinue, said financial assistance, the following:

(a) Notice of the proposed action must be mailed to a recipient at least seven days prior to the proposed effective date, advising the recipient of the reasons for the proposed action and his right to appear in person at a hearing before a review officer.

(b) There must be disclosure to the recipient at such hearing of the evidence, including the source thereof, relied upon for the proposed action and an opportunity for the recipient to confront and have questioned a person so disclosed if the value of his evidence depends upon his credibility and the latter is brought into question, unless secrecy in a particular case can be demonstrated to be an important interest of the agency.

(c) The review officer must be superior to the supervisor who proposed or approved the proposed action, and his decision must be based solely on the evidence before him which was made available to the recipient, with the exception for secrecy set forth above.

Order of Three Judge Court

It is also ORDERED, ADJUDGED AND DECREED THAT:

3. Plaintiffs' complaints be deemed amended pursuant to their motion filed June 17, 1968.

4. The motion of the proposed intervenors to intervene as parties plaintiff is granted.

5. Plaintiffs' motion to dissolve the stay of discovery proceedings is denied.

6. Defendants' motion for summary judgment is denied.

7. Any issues relating to payment of retroactive benefits are reserved for further order of the court, upon application of plaintiffs on due notice to defendants if plaintiffs and defendants are unable to agree as to the disposition of such matters.

8. This order and every section thereof is stayed to and including the 30th day of December 1968, to allow defendants to take the necessary steps to obtain a further stay, if they seek it, from the Supreme Court.

Dated: New York, N.Y.
December 13, 1968

Wilfred Feinberg
U.S.C.J.

Frederick vP. Bryan
U.S.D.J.

Edward C. McLean
U.S.D.J.

Appellants' Application for Stay of District Court Order

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

To the Honorable John Marshall Harlan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Appellant, Jack R. Goldberg, seeks an order of this Court staying an order issued on December 13, 1968 by a three judge district court in the Southern District of New York, pending the filing of an appeal and a final determination of the question presented by this Court. In support of this application, appellant respectfully submits the following:

1. The plaintiffs in these consolidated causes are welfare recipients in the City of New York. They claimed, and the three judge court below agreed, that the procedures for termination of welfare benefits in the City of New York deprived them of due process of law in that these proce-

dures failed to provide plaintiffs an opportunity prior to termination to appear personally before officials of the City Department of Social Services and confront the persons who had information tending to show that these recipients were no longer eligible to receive welfare benefits.

2. Defendants below included the Commissioner of the New York State Department of Social Services, the State Board of Social Welfare and Jack R. Goldberg, the New York City Commissioner of Social Services. For the reasons set forth below, only defendant Goldberg is applying for the instant relief.

3. In the Spring of 1968 the State of New York adopted a procedure (18 NYCRR 351.26(a)) whereby welfare recipients would be notified prior to the termination of their benefits as to the reasons for the pending termination and would be given an opportunity to appear before a review officer, with or without counsel at his option, and present such written or oral evidence or reasons as to why he should not be terminated. The State failed to provide either funds, facilities or staff to implement this new procedure. New York City objected and proposed an alternative procedure.

4. The alternative procedure (18 NYCRR 351.26(b)) was accepted by the State and thereafter each city had an option of following the procedures of 351.26(a) or (b). The key distinction between the two was that 351.26(b) did not provide for personal confrontation of the beneficiary with any witnesses the agency might have or with the review officer. The beneficiary instead was given a notice of proposed termination and the reasons therefor and was invited to submit any evidence or statements in writing tending to show why his benefits should not be terminated.

Any material submitted would then be reviewed along with any facts tending to show that benefits should be terminated. It was the lack of a personal appearance and opportunity to confront adverse witnesses that led the court below to find that the provisions of 351.26(b) failed to meet what it deemed to be the requisite demands of due process of law. The court sustained the constitutionality of 351.26(a), as interpreted in its decision, and for that reason the State officials who were defendants do not seek the relief requested herein. The decision of the three judge District Court is annexed hereto and marked Exhibit I. The full text of 18 NYCRR 351.26(a) and (b) is set forth in footnote 7. at pp. 34-37 of the decision.

5. Prior to the adoption of 351.26(a) and (b) there was no opportunity for a welfare recipient in New York to challenge the termination of benefits until after the fact. Then as now, however, once benefits were terminated the "fair hearing" procedures were available under the federally funded programs to review the local agencies' determination. Finally, under the provisions of Article 78 of the New York Civil Practice Law and Rules, court review can be obtained if the result of the fair hearing is adverse to the recipient.

6. This defendant moved for a summary judgment below on the basis that the administrative review provided by 351.26(b) when coupled with an opportunity for a fair hearing, in the event of an unfavorable ruling, met the requirements of due process under the circumstances—including the duty of defendant to avoid keeping persons on the welfare rolls who should be removed. This motion was denied.

7. Issues similar to those presented here came before a three judge District Court in the Northern District of

California in a case entitled *Mae Wheeler* v. *John Montgomery, et al.* (No. 48303, April 17, 1968, appeal docketed, 37 U.S.L.W. 3152, Oct. 22, 1968, No. 634) now pending in this Court. The termination procedures under attack in *Wheeler,* which appear no more favorable to recipients than those of 351.26(b), were sustained by the three judge court in that case. A copy of the *Wheeler* decision is annexed hereto and marked Exhibit II.

8. The law in this area, in light of the conflicting District Court decisions and the recognized principle that the requirements of due process vary under different circumstances, should be clarified by this Court. Until this can be done, the order, including a preliminary injunction, granted by the court below should be stayed. While there is no doubt that an improper decision to terminate welfare benefits will damage the recipient, the beneficiaries' cases referred to by the District Court (Decision pp. 9-11) were terminated before the present review procedures were operative in New York City. The new procedures under 351.26(b) might well have avoided the termination by giving the recipients an opportunity to explain the circumstances that led to their termination. These new procedures have been operative for about only six months. They were put into effect during the course of the present litigation. If the ultimate result of *Wheeler* and this case, moreover, is to require a hearing in person prior to termination, a stay will be needed to permit the City to staff and train the necessary review officers. If due process is to be meaningful the procedures must be in the hands of competent persons not presently available for this function.

9. In the decision below the Court stated (at p. 33) "if defendants desire a stay pending appellate review, their proposed order should so provide." This defendant

submitted a proposed order requesting a stay pending appellate review and it was granted to the extent provided for in paragraph 8 of the order issued herein on December 13, 1968 which states:

> "This order and every section thereof is stayed to and including the 30th day of December, 1968 to allow defendants to take the necessary steps to obtain a further stay, if they seek it, from the Supreme Court."

A copy of the order entered below is annexed hereto marked Exhibit III.

10. Jurisdiction to hear the appeal in this matter is found in 28 U.S.C. §1253. Jurisdiction to grant the stay requested herein is found in Rules 18, 50 and 51 of the Rules of the Supreme Court of the United States. No prior application for the relief sought herein has been made to any court or judge or justice thereof except the application referred to in paragraph 9 above.

WHEREFORE, appellant Jack R. Goldberg prays that the order of the three judge District Court below, issued on December 13, 1968 be stayed pending the filing of an appeal and the final determination of the matter by this Court.

Respectfully submitted,

J. Lee Rankin
Corporation Counsel of the
City of New York
By John J. Lofin, Jr.
Assistant Corporation
Counsel

Denial of Stay by Mr. Justice Harlan

Having considered the papers before me in light of the factors that should make for or against the granting of the interim relief sought—see, e.g., *Magnum Co.* v. *Coty*, 262 U. S. 159 (1923); *United States* v. *United Liquor Corp.*, 77 S. Ct. 208 (1956); *Railway Express Agency, Inc.* v. *United States*, 82 S. Ct. 466 (1962)—I am satisfied that a stay should not issue. Accordingly, this application is denied.

January 10, 1969

Stipulation Extending Stay of Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

It is hereby stipulated and agreed between Lee A. Albert, counsel for Plaintiffs in the above entitled actions, and John Loflin, of counsel to J. Lee Rankin, Corporation Counsel of the City of New York, and counsel for Defendant Jack Goldberg in the above entitled actions, that the stay of the order of this court of December 13, 1968 expiring on December 30, 1968 be extended to and including January 13, 1969 so as to allow response to the application of the City of New York for a further stay from the United States Supreme Court served this 23rd day of December. This stipulation shall be filed in the United States District Court this 23rd day of December.

Lee A. Albert
Counsel for Plaintiffs

John Loflin
of counsel to
J. Lee Rankin,
Corporation Counsel for the
City of New York

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE is hereby given that Jack R. Goldberg, a defendant above named hereby appeals to the Supreme Court of the United States from the interlocutory order of a three-judge District Court entered in this action on December 13, 1968 which (1) enjoined defendants from discontinuing public assistance to recipients thereof in the manner prescribed by 18 N.Y.C.R.R. 351.26(b), (2) denied plaintiffs' motion to enjoin the operation of 18 N.Y.C.R.R. 351.26(a) on condition that such section be construed to require

(a) Notice of the proposed action must be mailed to a recipient at least seven days prior to the proposed effective date, advising the recipient of the reasons for the proposed action and his right to appear in person at a hearing before a review officer.

(b) There must be disclosure to the recipient at such hearing of the evidence, including the source thereof, relied upon for the proposed action and an opportunity for the recipient to confront and have questioned a person so disclosed if the value of his evidence depends upon his credibility and the latter is brought into question, unless secrecy in a particular case can be demonstrated to be an important interest of the agency.

(c) The review officer must be superior to the supervisor who proposed or approved the proposed

action, and his decision must be based solely on the evidence before him which was made available to the recipient, with the exception for secrecy set forth above.

(3) granted plaintiffs' motion to amend their complaints,

(4) granted the motion of the proposed intervenors to intervene as parties plaintiff, and (5) denied defendants motion for a summary judgment.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated: New York, N.Y.
January 6, 1969

J. Lee Rankin
Corporation Counsel
Attorney for Defendant
Jack R. Goldberg
Office & P.O. Address
Municipal Building
Borough of Manhattan
City of New York 10017

By John J. Loflin
Assistant Corporation
Counsel

Notice of Appeal to the Supreme Court of the United States

To:

Lee A. Albert, Esq.,
Henry A. Freedman, Esq.,
401 West 117th Street
New York, New York 10027
Attorneys for Plaintiffs and
Intervenor-Plaintiffs

Hon. Louis J. Lefkowitz
Attorney General of the
State of New York,
80 Centre Street
New York, New York 10013
Attorney for defendants
other than Jack R. Goldberg

Hon. Edwin L. Weisl, Jr.
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C.

and

Hon. Robert M. Morgenthau
United States Attorney for the
Southern District of New York
United States Court House
Foley Square, New York, N.Y. 10007

Attorneys for United States of
America, Amicus Curiae

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE is hereby given that George K. Wyman, individually and in his capacity as Commissioner of the New York State Department of Social Services and Hugh R. Jones, as Chairman of the State Board of Social Welfare, and Mrs. Omar Adams, Dorothy I. Height, Richard K. Kimmerer, John M. Galbraith, Edward J. Johannes, Jr., Arthur G. Hopkins, Mrs. Monica M. McConville, John P. Hale, Mrs. Alexander E. Holstein, Jr., Frederick A. Klingenstein, George F. Berlinger, Theodore C. Jackson, Jose Lopez, and David Bernstein, as Members of the Board of Social Welfare, defendants in the above action, hereby appeal to the Supreme Court of the United States from the order of a three-judge Court entered in this action on December 13, 1968 which (1) enjoined defendants from discontinuing public assistance to recipients thereof in the manner prescribed by 18 N.Y.C.R.R. 351.26(b), (2) denied plaintiffs' motion to enjoin the operation of 18 N.Y.C.R.R. 351.26(a) on condition that such Section be construed to require

> (a) Notice of the proposed action must be mailed to a recipient at least seven days prior to the proposed effective date, advising the recipient of the reasons for the proposed action and his right to appear in person at a hearing before a review officer.
>
> (b) There must be disclosure to the recipient at such hearing of the evidence, including the source

thereof, relied upon for the proposed action and an opportunity for the recipient to confront and have questioned a person so disclosed if the value of his evidence depends upon his credibility and the latter is brought into question, unless secrecy in a particular case can be demonstrated to be an important interest of the agency.

(c) The review officer must be superior to the supervisor who proposed or approved the proposed action, and his decision must be based solely on the evidence before him which was made available to the recipient, with the exception for secrecy set forth above.

(3) granted plaintiffs' motion to amend their complaints, (4) granted the motion of the proposed intervenors to intervene as parties plaintiff, and (5) denied defendants motion for a summary judgment.

This appeal is taken pursuant to 28 U.S.C. §1253.

Dated: New York, New York
January 8, 1969

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
other than Jack R. Goldberg
Office & P.O. Address
80 Centre Street
New York, New York 10013

By Joel H. Sachs
Assistant Attorney General

Notice of Appeal to the Supreme Court of the United States

To:

J. Lee Rankin
Corporation Counsel
Attorney for Defendant
Jack R. Goldberg
Municipal Building
New York, New York 10007

Lee A. Albert, Esq.
Henry A. Freedman, Esq.
Attorneys for Plaintiffs and
Intervenor-Plaintiffs
401 West 117th Street
New York, New York 10027

Hon. Edwin L. Weisl, Jr.
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C.

Hon. Robert M. Morgenthau
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Stipulation Withdrawing Appeal of Defendants Wyman *et al.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED by and between all parties to this proceeding that pursuant to Rule 14 of the Rules of the Supreme Court of the United States, defendants George K. Wyman, individually and in his capacity as Commissioner of the New York State Department of Social Services and the defendant members of the New York State Board of Social Welfare hereby withdraw from prosecuting the appeal in this case to the Supreme Court of the United States.

Dated: New York, New York
February 25, 1969

Louis J. Lefkowitz, Esq.
Attorney General of the
State of New York
Attorney for Defendants
Wyman and the New York
State Board of Social
Welfare

J. Lee Rankin, Esq.
New York City Corporation
Counsel
Attorney for Defendant
Goldberg

Lee A. Albert, Esq.
Attorney for Plaintiffs and
Intervenor-Plaintiffs

Order to Transmit Papers

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the annexed affidavit of JOHN J. LOFLIN, duly sworn to on the 7th day of February, 1969, upon the notice of appeal of the appellant, Jack R. Goldberg, filed herein on the 6th day of January, 1969, and upon all the papers filed and proceedings had herein,

Now, upon the motion of John J. Loflin, attorney for the above-named appellant, it is hereby

ORDERED, that pursuant to the United States Supreme Court Rule 12(3), the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Supreme Court of the United States all the original papers filed in the Office of the Clerk of this Court which are the record on appeal; and it is further

ORDERED, that said records be safely kept by the Supreme Court of the United States and that they be returned to the Clerk of this Court upon the conclusion of this appeal.

_____

U.S.D.J.

Dated: New York, New York
February 7, 1969

Affidavit of John J. Loflin in Support of Motion for Order to Transmit Papers

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOHN J. LOFLIN, being first duly sworn, deposes and says:

That he is attorney for appellant, Jack R. Goldberg, is familiar with all the proceedings heretofore had herein and submits this affidavit in support of the annexed proposed order for the transmission of original papers herein to the Clerk of the Supreme Court of the United States.

The above entitled action was brought to enjoin defendants from discontinuing public assistance to recipients thereof in the manner prescribed by 18 N.Y.C.R.R. 351.26 (a) and 18 N.Y.C.R.R. 351.26(b). Said action was heard before a statutory three-judge court of this District. On December 13, 1968, an interlocutory order of the District Court was entered (1) enjoining defendants from discontinuing public assistance to recipients thereof in the manner prescribed by 18 N.Y.C.R.R. 351.26(b); (2) denying plaintiffs' motion to enjoin the operation of 18 N.Y.C.R.R. 351.26(a) on condition that said section be construed in a certain manner (3) granting plaintiffs' motion to amend their complaints, (4) granting the motion of the proposed intervenors to intervene as parties plaintiff, and (5) denying defendants' motion for a summary judgment.

Affidavit of John J. Loflin

A notice of appeal from said judgment to the Supreme Court of the United States was duly filed herein on January 6, 1969, by the appellant, Jack R. Goldberg.

The record for transmission to the Supreme Court is extensive. The reproduction of all papers would be an inordinately burdensome undertaking and the task of conforming such reproduced papers by the Clerk of this Court would be both time consuming and costly.

Rule 12 (3) of the Rules of the United States Supreme Court permits the transmission of original records in lieu of transcript. Affiant will cooperate with and assist the Clerk of the Court in assembling and indexing the papers.

No previous application has been made for the relief sought herein.

John J. Loflin

(Signed and sworn to February 7, 1969.)

Supreme Court of the United States

No. 1120 -----, *October Term, 19* 68

Jack R. Goldberg, Commissioner of Social Services of the City of New York,

Appellant,

v.

John Kelly, et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 634.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

James J. Boland

being duly sworn, says, that on the 27 day of June, 1969

at No. 401 W 117 in the Borough of Manhattan in The City of New York, he served three copies

of the annexed Appendix upon Albert J. Freedman Esq.,

the attorney for the Appellees in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 27
day of June, 1969

James J. Boland

Dennis J. Conroy

DENNIS J. CONROY
Notary Public, State of New York
03-0737368
Qualified in Bronx County
Commission Expires March 30, 1971

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 6 1969
JOHN F. DAVIS, CLERK

(39328)

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

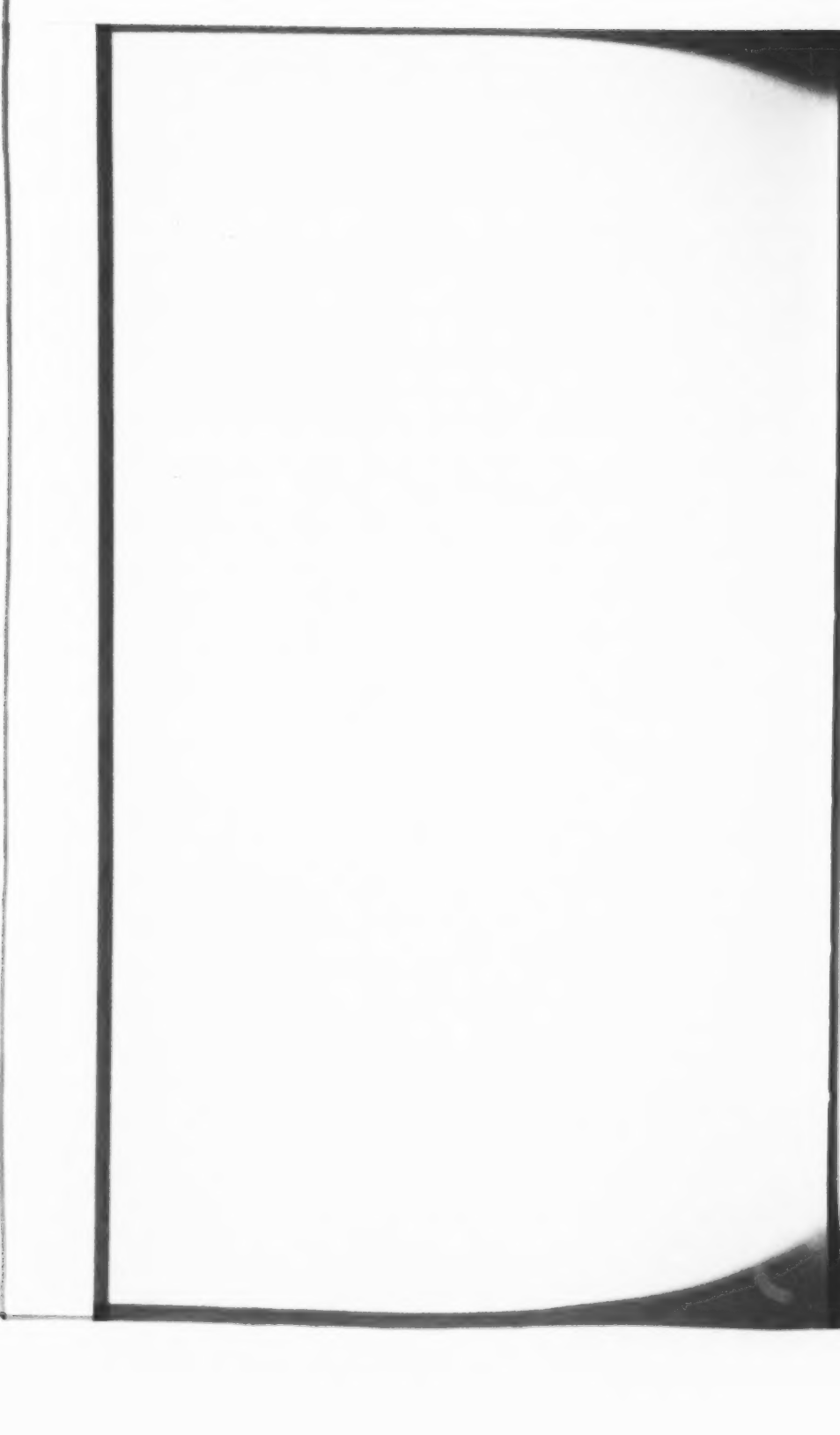
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Corporation Counsel of the City of New York,
Attorney for Appellant,
Municipal Building,
New York, New York 10007

STANLEY BUCHSBAUM,
JOHN J. LOFLIN,
of Counsel.



INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Regulation Involved	2
Question Presented	2
Statement of the Case	3
The Question Presented is Substantial	6
1. The Regulation Challenged Below is Constitutional and Should Be Sustained	6
2. There is a Conflict Between the Instant Decision Below and the Decision on a Similar Question in *Wheeler* v. *Montgomery, et al.* (Northern District of California, No. 48303, April 17, 1968, appeal docketed, 37 U. S. L. W. 3152, Oct. 22, 1968, No. 634) now pending in this Court	11
Conclusion	13

Appendices:

A. Order of the United States District Court, Southern District of New York	A1
B. Opinion of the District Court	A5
C. Regulation Involved—18 N. Y. C. R. R. 351.26	A35
D. New York City Department of Social Services Procedure No. 68-18.	A39

Cases Cited

	PAGE
Cafeteria and Restaurant Workers Union v. McElroy, 367 U. S. 886 (1961)	6
Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961)	6
Federal Communications Commission v. W. J. R., 337 U. S. 265 (1949)	6
Hanah v. Larche, 363 U. S. 420 (1966)	6
Madera v. Board of Education of City of New York, 386 F. 2d 778 (2nd Circ., 1967)	7
Phillips v. Commissioner, 283 U. S. 589 (1931)	7
Reaves v. Ainsworth, 219 U. S. 296 (1911)	6
Snell v. Wyman, 281 F. Supp. 853 (D. Ct., N. Y. 1968) affirmed . . . U. S. . . ., 89 S. Ct. 553 (1969)	9
United States v. Wood, 61 F. Supp. 175 (D. Ct., Mass., 1945)	7
Wheeler v. Montgomery, et al. (Northern District of California, No. 48303, April 17, 1968, appeal docketed, 37 U. S. L. W. 3152, Oct. 22, 1968, No. 634	11, 12

Statutes Cited

	PAGE
United States Constitution:	
Fourteenth Amendment	3
28 United States Code:	
Section 1253	2
Section 2281	2
Section 2284	2
42 United States Code:	
Section 301, et seq.	2
Section 1983	2
New York Civil Practice Law and Rules:	
Article 78	5
Social Service Law:	
§ 104	9
§ 360	9
New York Civil Service Law:	
Section 75	12
New York Education Law:	
§ 2573(7)	12

Other Authorities Cited

PAGE

18 Codes Rules and Regulations of the State of New York:

351.26 ..... 1, 2, 3, 4, 5, 9, 10, A35

New York City Department of Social Services Procedure No. 68-18 ..... 4, 5, 10, A39

United States Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part IV—6000-6400, as amended on February 8, 1968 in Handbook Transmittal No. 140 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from an order of the United States District Court for the Southern District of New York granting appellees' motion for a preliminary injunction staying all proceedings under 18 Codes Rules and Regulations of the State of New York 351.26(b), relating to the termination of benefits to persons receiving public assistance and denying appellant's motion for a summary judgment dismissing the complaints in these consolidated actions.

Appellant submits this Statement to show that the Supreme Court has jurisdiction of this appeal and that the appeal presents a substantial question for determination by this Court.

Opinion Below

The opinion of the District Court is unreported. It is set out in the Appendix to this Jurisdictional Statement as Appendix B.

Jurisdiction

This appeal is taken pursuant to title 28 of the United States Code, Section 1253.

In their complaints, appellees, who are welfare recipients in New York City, sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, Title 42 United States Code, Section 1983 and the Social Security Act, Title 42 United States Code, Section 301 *et seq.* A three judge court was convened pursuant to Title 28 United States Code, Sections 2281 and 2284. Thereafter, on November 26, 1968 the three judge court issued its decision granting appellees' motion for a preliminary injunction and denying appellant's motion for a summary judgment. The order appealed from was issued on December 13, 1968. The text of this order is set forth as Appendix A, below. Appellant's notice of appeal to this Court was filed in the Southern District of New York on January 6, 1969.

Regulation Involved

Title 18 N. Y. C. R. R., Section 351.26, is the regulation involved on this appeal. The text thereof is set forth as Appendix C, below.

Question Presented

Does a regulation which

1. requires seven days' notice to beneficiaries of public assistance of an intent to terminate benefits,

2. provides that the reasons for the proposed termination be set forth in the notice,

3. affords beneficiaries an opportunity to obtain a review of the proposed action and to submit any written statement or other evidence to demonstrate why this grant should not be terminated,

4. mandates that the reviewing officer be a person in a superior position to the supervisor who approved the proposed termination, and

5. continues public assistance until the review is completed

comply with due process of law particularly in light of the facts that (a) a subsequent fair hearing is available to review any errors that may occur and (b) any benefits improperly withheld will be restored?

Statement of the Case

This action was brought by appellees, who are recipients of public assistance, for a declaratory judgment and for an injunction. They sought a declaration that the regulation (New York State Department of Social Services, Regulation 351.26) governing the termination of public assistance, provided pursuant to Title 42 of the United States Code and the Social Welfare Law of New York, is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution and is otherwise unlawful in that it violates the Social Security Act. Specifically, appellees asserted that the regulation fails to provide for adequate notice and an opportunity for a hearing which satisfies standards of due process of law prior to termination or suspension of public assistance.

They also sought and the court below granted an injunction restraining defendants from terminating or suspending public assistance prior to a hearing of a type

which the appellees regarded as necessary to meet standards of due process of law. Appellees claimed that they and persons similarly situated have been or may be unconstitutionally deprived of public assistance under the procedures challenged.

The applicable regulation (Section 351.26) of the New York State Department of Social Services was amended after this action was commenced but prior to the convening of the three judge court. The present regulation is set forth in full as Exhibit "A" to the affidavit of defendant Jack R. Goldberg sworn to on May 8, 1968, and also appears as Appendix C, below.

Under the State regulation, the Commissioner of Social Services of New York City had the option of following a State procedure for termination of benefits (§351.26 [a]) or adopting local procedures which comply with the standards of §351.26 (b). Defendant Goldberg elected to proceed under §351.26 (b), and he presented a plan under that section which was approved. The local procedure as first proposed is annexed as Exhibit "B" to Commissioner Goldberg's affidavit of May 8, 1968. Subsequently, on May 21, 1968, the local procedures were modified and on May 27, 1968 became operational throughout the City. These procedures (No. 68-18) are set forth in Exhibit "1" to Commissioner Goldberg's affidavit of June 14, 1968, and also appear as Appendix D, below.

Thus, in order to consider the questions presented here the Court should examine the text of §351.26 as implemented by New York City in its Procedure No. 68-18 dated May 21, 1968.

The present procedure for termination of public assistance in New York City involves the following steps: (1) discussion by a caseworker with a client as to rea-

sons for proposed discontinuance of assistance; (2) report by caseworker to his unit supervisor; (3) approval by unit supervisor of proposed discontinuance; (4) a notice of proposed discontinuance with the reasons therefor is sent to the client. The notice also advises the client that he may request a review of the proposed discontinuance within seven days and that he may submit any statement or document in writing, personally or through an attorney or any other representative, to show his continued eligibility to receive public assistance. (5) Where a review is requested, a review officer, who is superior in position to the unit supervisor, reviews the case record and any material submitted by the client. Assistance is not terminated unless and until the review officer makes a decision adverse to the client. (6) If the decision is to discontinue assistance, the case record is returned to the unit supervisor and, in turn, to the caseworker who sends written notice of the decision to the client. This notice states the reasons for discontinuance and advises the client of his right to a Fair Hearing. (7) Thereafter a Fair Hearing before State officials will be held if requested and, if the result is adverse to the client, the determination is subject to judicial review under Article 78 of the New York Civil Practice Law and Rules. Federal regulations require that, where an incorrect decision is made adverse to the client, the agency must make corrected payments retroactive to the date the incorrect action was taken.

The procedure just outlined is derived from Regulation 351.26 of the New York State Department of Social Services; Procedure No. 68-18 of the New York City Department of Social Services; and United States Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part IV—6000-6400, as amended on February 8, 1968 in Handbook Transmittal No. 140.

ARGUMENT

The Question Presented Is Substantial

1. The Regulation Challenged Below Is Constitutional and Should Be Sustained.

The formalities of judicial proceedings are not required at every stage of the administrative process, particularly where judicial review is available to correct error. "The requirements of due process frequently vary with the proceeding involved." *Hanah* v. *Larche*, 363 U. S. 420, 440 (1960). "What is due process of law must be determined by circumstances." *Reaves* v. *Ainsworth*, 219 U. S. 296, 304 (1911), *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150, 155 (1961).

In *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886 (1961), the court stated (pp. 894-895):

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation. [citations omitted] '"[D]ue process", unlike some legal rules is not a technical conception with fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * *.' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162-163 (concurring opinion)."

Oral presentations are not invariably required. In *Federal Communications Commission* v. *W. J. R.*, 337 U. S. 265 (1949), the court said (p. 275):

> "[D]ue process of law has never been a term of fixed and invariable content. This is true with ref-

> erence to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner* v. *Denver,* 210 U. S. 373, in others that argument submitted in writing is sufficient. *Morgan* v. *United States,* 298 U. S. 468, 481."

Similarly the participation of legal counsel is not always required in administrative proceedings. *Madera* v. *Board of Education of City of New York,* 386 F. 2d 778 (2nd Circ., 1967).

Under appropriate circumstances it is permissible for the government to act first and conduct all review proceedings later. In *Phillips* v. *Commissioner,* 283 U. S. 589 (1931), the court stated (pp. 595-597):

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.
>
> * * *
>
> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

In *United States* v. *Wood,* 61 F. Supp. 175 (D. Ct., Mass., 1945), the court stated (p. 179):

> "It is clear that, when administrative action is taken in an adversary proceeding without affording ade-

> quate notice and opportunity to defend to interested parties, basic constitutional rights are invaded • • • This does not mean that the hearing must invariably precede the administrative action. Where considerations of administrative expediency weigh heavily, and where opportunity for a full and adequate hearing is available within the administrative process, no fundamental rights are transgressed when the hearing follows, rather than precedes, the action of the administrative agency."

This Court, as illustrated above, has not defined "due process" as a set of rigid rules applicable regardless of the circumstances. Where private rights of life or liberty are in jeopardy, as in criminal proceedings, strict adherence to procedural safeguards is necessary. Where, however, the action in question is administratve in nature, subject to later judicial scrutiny, flexibilty of procedure appropriate to protect both the indivdual and the state is permissible.

There are hundreds of thousands of persons receiving public assistance in New York City. The cost of the program is enormous. The New York City Budget for 1966-67 provided $587,807,056 for public assistance (The City Record, 6/30/66, p. 52). For 1967-68 the figure was $839,155,551 (id. 6/29/67, p. 75). There is no reason to assume this figure will decline in the immediate future. There are obviously thousands of personal tragedies behind the statistics of public assistance. The need for aid is acute and in many cases chronic. The individual cases rightfully should elicit compassion, understanding and financial aid. A civilized society should do no less and probably should do much more than has been done to date.

This does not mean, however, that the program adopted by the legislature and supported by hundreds of millions of dollars should be administered without some regard for fiscal and administrative control. Some people apply for assistance who are not eligible. Some who are eligble later become ineligible and must be removed from the rolls.

In *Snell* v. *Wyman*, 281 F. Supp. 853, 859 (D. Ct., N. Y., 1968) affirmed .... U. S. ...., 89 S. Ct. 553 (1969) former Commissioner of Welfare Mitchell Ginsberg testified that his office had "a dual responsiblity. One is to the client and the other is to the accountability of the appropriate use of the public funds." The *Snell* case challenged the constitutionality of the recovery provisions of the Social Service Law (§§104, 360) and regulations. In sustaining the statute the court stated (p. 865):

> "Urging that the statutes be erased sweepingly on their face, plaintiffs ignore the fact that the discretion conferred upon administrators is subject to test and check both in administrative 'fair hearings' . . . and on judicial review under N. Y. CPLR Article 78."

The court below was properly concerned about the condition of welfare recipients and the added difficulties they would experience in the event of an erroneous decision to terminate benefits. It selected as case examples, however, persons whose benefits had been terminated without notice and without any opportunity for review under prior procedures superseded by the adoption of the regulation now challenged. Although the District Court sustained Section 351.26(a), as interpreted, it nevertheless struck down Section 351.26(b) as unconstitutional. Its conclusion seems to be based largely on prior terminations ef-

fective before any review procedures were in effect. The District Court did not measure Section 351.26(b) against the results obtained under its prior review procedures, but found it unconstitutional on its face as deficient in due process in light of the experience of beneficiaries who had no prior review at all.

This conclusion was not warranted under the circumstances. Section 351.26(b) can be made to work fairly, particularly when implemented under the carefully drawn provisions of New York City Procedure No. 68-18, annexed to appellant's affidavit of June 14, 1968, and set forth as Appendix D, below. There was no basis on which the District Court could predict that this newly implemented regulation would fail to protect welfare recipients and provide them in practice with at least the minimum requirements of due process of law. The regulation did not become effective until May 27, 1968, in New York City.

Appellees claimed that, even in the few weeks between the effective date of the regulation in New York City and the hearing before the three-judge Court, the regulation was not being implemented to their satisfaction. It was asserted that some of the notices were inadequate and, in effect, that errors might still occur. Under any new procedures affecting thousands of persons it is likely that errors may occur. They need not be fatal. They need not go uncorrected. Appellant was determined to implement the new regulation in a manner sympathetic and responsive to the rights of welfare beneficiaries and consistent with his duty to avoid waste of public funds. Section 351.26(b), as implemented by Procedure No. 68-18, affords adequate protection for appellees' rights and its use should not have been enjoined.

2. There Is a Conflict Between the Instant Decision Below and the Decision on a Similar Question in *Wheeler* v. *Montgomery, et al.* (Northern District of California, No. 48303, April 17, 1968, appeal docketed, 37 U. S. L. W. 3152, Oct. 22, 1968, No. 634) Now Pending in This Court.

In *Wheeler* v. *Montgomery, et al.*, questions very similar to those presented here were raised before a three-judge court. The California procedure, among other things, called for a conference between the client and "his caseworker, an eligibility worker, or another responsible person in the county department" to discuss the question of termination of assistance. Notice of the meeting was to be sent not later than three days prior to the next date a client might expect to receive a payment. The plaintiffs objected to the procedure on five grounds:

> "(1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an 'impartial' referee; (2) the three day notice requirement is too short; (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence present at the conference; (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required."

In sustaining the California procedure the court stated:

> "The constitutionality of the 'informal conference' must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff

> seeks. At present such 'fair hearing' is required to be given within 45 days and a decision rendered within the next 75 days. As of July 1, 1968, the hearing and decision will be required to be made within 60 days."

A comparison of the New York provisions on termination with those sustained in *Wheeler* indicates that the New York provisions offer a more adequate opportunity for a meaningful review of the client's status prior to termination than the provisions approved in *Wheeler*. Even if this were not true, it does not follow that the New York procedure is unconstitutional. Uniformity among the states is not required although all must meet the same minimal standards.

In New York a person on public assistance must get at least seven days notice prior to termination. If the client requests a review of the proposed discontinuance, assistance will continue until the review officer makes his determination. If the review officer commits error, assistance payments will be restored in full retroactively after a "fair hearing." By comparison, a civil service employee can be suspended without pay for 30 days by immediate action of his department head who intends to prefer charges against him under Section 75 of the New York Civil Service Law. Similarly, teachers may be suspended without pay for 90 days pending disposition of charges (New York Education Law, §2573[7]). In both instances, if the charges are dismissed, the employee is entitled to reinstatement with full back pay. The reasons for these statutes have application here. Public money should not be paid out to persons who are not entitled to receive it.

Appellant does not claim that thousands of cases can be processed without error. Where error occurs however, it does not necessarily follow that the procedures are consti-

tutionally defective especially where both "fair hearing" procedures and judicial review are available to correct administrative mistakes. The present procedures strike a reasonable balance between the needs and rights of the welfare client and the need to protect the public's tax revenues. The policy at the federal, state and local level is clear: assistance must be provided for those who qualify but all reasonable efforts must be made to terminate promptly but fairly payments to all those who become ineligible. The procedures adopted in New York City for termination of public assistance should have been sustained.

CONCLUSION

For the reasons stated above, a substantial question under the Constitution is presented in this case. Jurisdiction should be noted.

March 5, 1969.

Respectfully submitted,

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Stanley Buchsbaum,
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APPENDIX A

Order Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Three-judge Court

68 Civ. 394

68 Civ. 864

JOHN KELLY, et al.,

Plaintiffs,

RUBY SHEAFE, et al.,

Plaintiffs,

and

TERESA NEGRON, et al.,

Intervenor-Plaintiffs,

against

GEORGE K. WYMAN, et al.,

Defendants.

The plaintiff in these consolidated causes having moved this court for (1) a preliminary injunction staying the operation of 18 N. Y. C. R. R. 351.26(a) and (b), (2) an order dissolving the stay of discovery proceedings previously entered by the Honorable Frederick van Pelt Bryan, District Judge, (3) an order permitting them to amend the complaint in the consolidated case, and (4) an order

permitting them to add twelve intervenor-plaintiffs in the action, and the defendants having moved this court for summary judgment, and these motions having been considered by this court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, and the United States as amicus, and the hearings held to date, and the opinion of this court dated November 26, 1968, and this court having found in said opinion that discontinuance of public assistance benefits without the opportunity for a prior hearing meeting the due process standards spelled out therein causes irreparable injury to recipients of public assistance wrongfully terminated and is a violation of the rights secured to them by the fourteenth amendment to the Constitution of the United States, it is

ORDERED, ADJUDGED AND DECREED THAT

1. Pending further order of this court or termination of this action, defendants and their officers, employees and agents are hereby enjoined and restrained from directly or indirectly discontinuing, or notifying recipients of an intent to discontinue, financial assistance pursuant to the state's public assistance programs in the manner prescribed by 18 N. Y. C. R. R. 351.26(b).

2. Plaintiffs' motion for a preliminary injunction staying the operation of 18 N. Y. C. R. R. 351.26(a) is denied, on the condition that 18 N. Y. C. R. R. 351.26(a) be construed to require, with respect to discontinuing, or notifying recipients of an intent to discontinue, said financial assistance, the following:

(a) Notice of the proposed action must be mailed to a recipient at least seven days prior to the pro-

posed effective date, advising the recipient of the reasons for the proposed action and his right to appear in person at a hearing before a review officer.

(b) There must be disclosure to the recipient at such hearing of the evidence, including the source thereof, relied upon for the proposed action and an opportunity for the recipient to confront and have questioned a person so disclosed if the value of his evidence depends upon his credibility and the latter is brought into question, unless secrecy in a particular case can be demonstrated to be an important interest of the agency.

(c) The review officer must be superior to the supervisor who proposed or approved the proposed action, and his decision must be based solely on the evidence before him which was made available to the recipient, with the exception for secrecy set forth above.

It is also ORDERED, ADJUDGED AND DECREED THAT:

3. Plaintiffs' complaints be deemed amended pursuant to their motion filed June 17, 1968,

4. The motion of the proposed intervenors to intervene as parties plaintiff is granted.

5. Plaintiffs' motion to dissolve the stay of discovery proceedings is denied.

6. Defendants' motion for summary judgment is denied.

7. Any issues relating to payment of retroactive benefits are reserved for further order of the court, upon

application of plaintiffs on due notice to defendants if plaintiffs and defendants are unable to agree as to the disposition of such matters.

8. This order and every section thereof is stayed to and including the 30th day of December 1968, to allow defendants to take the necessary steps to obtain a further stay, if they seek it, from the Supreme Court.

Dated: New York, N. Y.
December 13, 1968

WILFRED FEINBERG
U. S. C. J.

FREDERICK P. BRYAN
U. S. D. J.

EDWARD C. McLEAN
U. S. D. J.

APPENDIX B

Opinion of United States District Court, Southern District of New York

FEINBERG, Circuit Judge:

These consolidated actions present another in the increasing number of attacks on prevailing state welfare practices.[1] Plaintiffs claim that the procedures in New York State for termination of welfare benefits deny due process and violate both the Social Security Act and regulations of the United States Department of Health, Education, and Welfare (HEW). The eight plaintiffs (six in one action, two in the other) are New York City welfare recipients; their complaints sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, 42 U. S. C. § 1983, and the Social Security Act, 42 U. S. C. §§ 301 et seq. Defendants are the Commissioner of the New York State Department of Social Services, the State Board of Social Welfare and the Commissioner of the New York City Department of Social Services. In May 1968, over the objections of defendants, Judge Bryan convened a three-judge court pursuant to 28 U. S. C. §§ 2281, 2284. F. Supp. (S. D. N. Y. 1968). Thereafter, a briefing schedule was fixed and hearings were held in June and July on a number of motions. Because of the interest of the United States in the monies expended under New York State and City welfare programs and in

[1] See, e.g., King v. Smith, 392 U. S. 309 (1968); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), argued, 36 U. S. L. W. 3425 (U. S. May 7, 1968), reargued, 37 U. S. L. W. 3157 (U. S. Oct. 29, 1968) (No. 813, 1967 Term; renumbered No. 9, 1968 Term); Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967).

the procedures set up to administer them, the court invited the United States to submit an amicus brief, which it did in early October 1968. For reasons hereafter indicated, we grant plaintiffs' motion for a preliminary injunction in part and deny it in part, and deny defendants' moton for summary judgment; the disposition of other motions is set forth in detail below.

I

Welfare programs in the United States generally fall into two groups: general assistance and categorical assistance.[2] The former is financed only by state and local governments; the latter refers to programs supported by grants from the federal government under the Social Security Act to give aid to particular categories of individuals, e. g., aid to families with dependent children (AFDC). Four of the original plaintiffs in this action[3] were recipients of general assistance, home relief under the New York Social Welfare Law. The other four[4] were recipients of AFDC, which New York State administers in accordance with the Social Security Act, 42 U. S. C. §§ 601-09. Funds of the United States are involved only in the latter program.

It is instructive on the state of administration of public welfare to review how both federal and New York State and City regulations have changed just since the institution of this consolidated action. At the time the

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[2] See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967).

[3] John Kelly, Randolph Young, Juan DeJesus and Ruby Sheafe.

[4] Pearl McKinney, Pearl Frye, Altagracia Guzman and Esther Lett. Twelve additional plaintiffs also sought to intervene. Of these, 10 were also in the AFDC program, and 2 received home relief only.

complaints were filed, state regulations dealing with both home relief and AFDC programs apparently required no *prior* notice at all of suspension of benefits and no hearing *prior* to that action. However, a state hearing procedure, which is designated as a "fair hearing," had been instituted to provide an administrative remedy *after* suspension or termination of benefits; in the case of home relief, the procedure went into effect barely two weeks before the first complaint was filed in this case. After the action began, the State Department of Social Services amended its regulations, effective March 1, 1968, to provide notice and an "administrative hearing" *before* termination of public assistance. Thereafter, apparently because the New York City Department of Social Services felt that it could not feasibly comply with that regulation, it was repealed, and a new regulation was adopted. Under it, welfare departments may choose one of two options described below, both of which continue to provide notice and a type of hearing before cessation of benefits. Subsequent to the State amendments, HEW adopted a new criterion for the administration of state plans, effective July 1, 1968, which requires that the agency:

> Gives advance notice of questions it has about an individual's eligibity so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance.

Handbook of Public Assistance Administration, Part IV, § 2300 (d) (5) (1968) ("Handbook").

The remedies for a welfare recipient who has been wrongfully suspended or terminated have also been changed in another significant respect. At the time the

suit was commenced, New York granted a reinstated recipient retroactive benefits for only two months and then only to the extent of debts for necessities which had been incurred.[5] Since the delay between wrongful termination of benefits and subsequent reinstatement often exceeded two months, the limit on retroactivity worked hardship. However, effective July 1, 1968, pursuant to a change in regulations issued by HEW, payments are now made fully retroactive and are not confined to reimbursement for debts incurred.[6]

As a result of these changes, welfare recipients in New York State now have a two-step procedure to protect them against alleged wrongful termination or suspension of benefits. The first, or pre-termination procedure, depends upon which of two options the local welfare agency has adopted. We are advised that in New York State, option (a) is in effect everywhere but in New York City, which has chosen to follow option (b). Both options are set forth in the margin.[7] Under option (a), the local

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[5] See 18 NYCRR 325.5(n)(5) (superseded 1968).

[6] See Handbook, Part IV, §§ 6200(k), 6300(g) (1968); 18 NYCRR 325.5(n)(6), as amended (Order of New York State Dept. of Social Services, June 28, 1968).

[7] Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such dis-

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agency must give seven days written notice, specifying the reasons for suspension, before aid is stopped. The recipient is entitled to appear before an official, who is

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continuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations.

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superior to the one who approved the suspension, and can present oral and written evidence with the aid of an attorney or other representative. Option (b), adopted

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and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any, of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedures must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

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by New York City, offers less procedural protection; e. g., although the notice provision is the same, the welfare recipient is entitled to submit a statement in writing to demonstrate why aid should continue. Under either option, if the recipient is unsuccessful, benefits cease. Thereafter, the terminated recipient is entitled to the second step, the so-called state "fair hearing,"[8] which spells out significant procedural rights and is a trial-type proceeding. Thus, that hearing is before an independent state hearing officer; the complaining recipient has the right of confrontation and cross-examination of

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(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or susension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

18 NYCRR 351.26.

[8] 18 NYCRR 84.2-23.

the witnesses against him; and a verbatim record is made of the hearing. The state regulations provide that the state fair hearing is to be held within ten working days of receipt of a request for the hearing, and a decision is to be rendered as soon as feasible, and, in any event, not later than twelve working days from the close of the hearing.[9]

II

Plaintiffs allege that even with the improved procedures, they are threatened with termination of assistance in a manner that is both unconstitutional and improper under the governing statute and regulations. Their constitutional argument is that under the due process clause of the fourteenth amendment they are entitled to a constitutionally adequate hearing before termination of benefits and that the procedures provided by the state and city do not meet this standard. Defendants do not deny plaintiffs' general propositions that the terminations here under attack amount to "state action" and that the protections of the due process clause apply. Nor do defendants attempt to argue that welfare benefits are a "privilege," rather than a right, and that therefore they may fix the procedures of termination as they see fit.[10] However, defendants do claim that the combined

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[9] We are advised by the amicus brief of the United States that HEW has found that the new state "fair hearing" plan is not acceptable, as it fails to comply with federal standards, see Handbook, Part IV, §§ 6000-6500 (1968), in several respects, but that New York is in the process of revising the plan to meet federal requirements.

[10] Cf. C. Reich, The New Property, 73 Yale L. J. 733 (1964); W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

hearing procedures now provided to welfare recipients meet constitutional and statutory requirements.

We agree with defendants that the state fair hearing procedure after termination of benefits seems constitutionally sufficient.[11] Defendants argue that combining the post-termination procedure with an informal pre-termination "hearing" disposes of all due process claims, citing principally Wheeler v. Montgomery, No. 48303 (N. D. Cal. April 17, 1968) (three-judge court), appeal docketed, 37 U. S. L. W. 3152 (U. S. Oct. 22, 1968) (No. 634). In that case, as in this, state hearing procedures for termination of welfare changed during the litigation. There, the state provided an "informal conference" before termination and a full hearing procedure within a few months thereafter. The court determined the constitutionality of the former "in light of" the latter and held that the combined procedure complied with due process.[12]

While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. The case of Angela Velez, one of the proposed intervenors, makes the point starkly. She was terminated on March 11, 1968, because her husband allegedly visited her home every night. She requested the post-termina-

[11] Although one of the United States' objections to this procedure, see note 9 supra, is that it fails to provide specifically that the hearing officer's decision must be based only upon evidence which is a part of the record, for constitutional purposes we would construe the regulations, see 18 NYCRR 84.15(a), to include such a requirement, in accordance with this opinion.

[12] Apparently a California state court disagreed with the California federal court. See McCullough v. Terzian, No. 379011 (Cal. Super Ct., Alameda County, May 1968).

tion state fair hearing in mid-March. The hearing was held in June, and, pursuant to the request of this court for expedition, the decision issued on July 10. The State Commissioner found that the information that caused suspension of benefits came from Mrs. Velez's landlady, that the information was untrue, that the husband does not live with his wife, that she had obtained a court order in 1966 to prevent his night visits, that he is allowed to visit the four small children only on Wednesday, and that at that time he brings his support money of $30 a week, but no more, in accordance with an agreement worked out in Family Court. Accordingly, the State Commissioner directed the local agency to reinstate assistance. However, in the four months between termination of AFDC benefits and the decision reversing the local agency, Mrs. Velez and her four children, ages one to six were evicted from her apartment for nonpayment of rent and went to live with her sister, who has nine children and is on relief. Mrs. Velez and three children have been sleeping in two single beds in a small room, and the youngest sleeps in a crib in the same room. Thirteen children and two adults have been living in one apartment, and Mrs. Velez states that she has been unable to feed her children adequately, so that they have lost weight and have been ill.

The case of Mrs. Esther Lett, one of the original plaintiffs, is also instructive. According to the affidavits of plaintiff Lett and her Legal Aid Society attorney: She and her four dependents, aged three months to fifteen years, were abruptly terminated from public assistance on February 1, 1968. The purported ground was that she had concealed her current employment by the Board of Education. In fact, she had worked for Operation Head Start in July and August 1967, but had not been employed

by the Board of Education after August 20, 1967. Since that date and up to February 1968, she had worked at Day Care Centers on twenty-six different days, earning a total of $300, with the knowledge of the local welfare agency. As a result of termination of assistance, she and her dependents were forced to live on the handouts of neighbors. On February 18, she and her family had to go to the hospital for severe diarrhea, apparently brought on by the only meal they had had that day—spoiled chicken and rice donated by a neighbor. She applied for emergency aid and a post-termination state "fair hearing" but the aid was refused and the fair hearing was not scheduled. Through the herculean efforts of The Legal Aid Society, including numerous telephone calls and three personal trips to local agencies, it was learned that the Board of Education had apparently made an error. However, the Board would not so inform the welfare agency until it requested a new verification. On Tuesday, February 27, Mrs. Lett went to a local center to seek emergency aid. Because she had not eaten all day, she fainted in the center, but when she awoke she was told that she could not get money for food immediately because it had not yet been authorized. Finally, after waiting eight hours, she was given $15 to feed herself and four dependents and told to return on Friday. After suit was brought, her assistance was apparently temporarily reinstated without prejudice.

We do not know what the truth is with regard to Mrs. Lett's alleged concealment of employment, although on the present record it appears that the termination of benefits was improper.[13] As for Mrs. Velez, it is clear that the de-

[13] Benefits to Mrs. Lett had also been suspended during March 1967; the suspension was found to be improper in a fair hearing decision in November 1967.

cision to terminate her payments was wrong. But the issue is not whether a specific termination was proper, but whether the procedures used were justifiable. There is no need to elaborate with further case histories. Suffice it to say that to cut off a welfare recipient in the face of this kind of "brutal need"[14] without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. Traditionally, such considerations have been urgent in nature and involve the health, safety, or well-being of many individuals. "Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." 1 K. Davis, Administrative Law Treatise ¶ 7.08, at 438 (1958), citing cases where great harm to the public was, or could be, immediately threatened.[15]

We turn then to examine the pressing need here that would justify a departure from the general standard of "the requisite [due process] hearing . . . before the final order becomes effective."[16] Simply stated by defendant New York City Commissioner, it is the "need to protect the public's tax revenues." This is, of course, not only a legitimate, but a necessary, concern of defendants, but the argument requires close analysis. Clearly, the state must see to it that assistance goes only to those who are entitled to it. However, the issue here affects only the continuation of bene-

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[14] See Note, Withdrawal of Public Welfare; The Right to a Prior Hearing, 76 Yale L. J. 1234, 1244 (1967) ("Yale Note").

[15] E.g., Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594 (1950) (mislabeled food products); Fahey v. Mallonee, 332 U. S. 245 (1947) (summary seizure of savings and loan association by conservator). See also cases cited in Yale Note 1240-41 nn. 26-35.

[16] Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 152-53 (1941).

fits while a claim of ineligibility is disputed. Defendants' asserted justification for the termination procedures now being used is therefore quite narrow. It is the additional cost of providing more elaborate procedures to determine whether the tentative decision to terminate benefits was correct, a cost which may come both from an increase in the number of hearings and from an extension of average time from notice of termination to end of hearing, during which period benefits continue. It is clearly within the power of the state and city to minimize that additional cost by various methods, e.g., by expediting hearings, by increasing the number of hearing officials, by utilizing statutory rights to recover monies paid since the date of ineligibility. Cf. Snell v. Wyman, 281 F. Supp. 853 (S. D. N. Y. 1968), appeal docketed, 36 U. S. L. W. 3489 (U. S. June 10, 1968 (No. 1529, 1967 Term; renumbered No. 191, 1968 Term). Moreover, it should be remembered that, insofar as ADFC or other categorical assistance is concerned, federal contributions are available to meet fifty per cent of the cost of benefits paid pending review and the administrative expense of the hearing procedures. See Handbook, Part IV, § 6500 (1968).

Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases.[17] The obvious fact

[17] Thus, it appears from the state wide figures submitted by defendants that in the fair hearings on discontinuance which reached decision from April through August of this year, only 50 of 78 cases, or 64%, were affirmed. Seventeen were reversed in whole, 1 in part, 3 remanded, and 7 received "miscellaneous" dispositions. Later figures for September and October, just submitted by defendants, show a higher percentage of affirmances.

is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful termination. The equally obvious remedy is to take greater care to prevent such injustice before it occurs. While the problem of additional expense must be kept in mind,[18] it does not justify denying a hearing meeting the ordinary standards of due process.[19] Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result.[20] In short, we must focus on the adequacy of the hearing procedures which defendants have provided prior to termination of benefits.

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[18] It has been noted that "the welfare system is designed to save money instead of people, and tragically ends up doing neither." David Ginsberg, Exec. Dir. Nat'l Advisory Comm'n on Civil Disorders, 23 Record of N. Y. C. B. A. 28 (Supp. 1968), quoting Mitchell Ginsberg, former head of New York City's Department of Welfare.

[19] Cf. D. Morris, Welfare Benefits as Property: Requiring a Prior Hearing, 20 Admin. L. Rev. 487, 506 (1968): "The state interest which circumscribes the property interest of a welfare recipient and also affects the type of procedural due process afforded is not the state's interest in its funds, but only whether the funds themselves accord with the aims of society."

[20] We note, in this context, that the United States indicates that HEW is presently considering adoption of a policy by which assistance would continue until a fair hearing decision was reached in at least some types of termination cases. This consideration, along with the present federal requirement of advance notification and opportunity for discussion, see pp. 5-6 supra, reinforces our expectation that providing adequate prior hearings will not unduly burden the administration of the welfare system.

(footnote continued on next page)

III

Cases dealing with procedural requirements of a hearing before an administrative tribunal are many and varied, involving such diverse administrative actions as discharge from public employment,[21] refusal to license,[22] revocation of security clearance, [23] treatment of aliens,[24] and admission to the bar,[25] to name only a few. Before considering plaintiffs' formidable list of objections to the pre-termination hearing procedures afforded welfare recipients, some observations based upon these and related cases may be in order.

(footnote continued from previous page)

Of course, we do not suggest that the same procedures are constitutionally requisite in all forms of social security administration. In the operation of the federally-administered Old-Age, Survivors, and Disability Insurance program, for example, the amicus brief indicates that no hearing prior to termination is available as of right. However, as that brief points out, there are far fewer reasons for termination of OASDI benefits than in the AFDC program, and these reasons are based on more objectively ascertainable facts. In OASDI the circumstantial changes on which termination is based are nearly always reported or confirmed by the recipient himself, and the likelihood of severe hardship resulting from erroneous termination is certainly not as great as in the welfare programs here in issue.

[21] Slochower v. Board of Educ., 350 U. S. 551, 554 (1956); cf. Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955).

[22] Bratton v. Chandler, 260 U. S. 110 (1922); Hornby v. Allen, 326 F. 2d 605 (5th Cir. 1964).

[23] Greene v. McElroy, 360 U. S. 474 (1958).

[24] Kwong Hai Chew v. Colding, 344 U. S. 590 (1953).

[25] Willner v. Committee on Character and Fitness, 373 U. S. 96 (1963). See also Goldsmith v. U. S. Board of Tax Appeals, 270 U. S. 117 (1926).

Appendix B—Opinion of United States District Court, Southern District of New York

1. It is impossible to define rigidly what constitutes procedural due process for all purposes. "[D]ue process of law has never been a term of fixed and invariable content." FCC v. WJR, 337 U. S. 265, 275 (1949). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers Local 473 v. McElroy 367 U. S. 886, 895 (1961).

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U. S. 420, 442 (1960).

2. While it is a well established principle that courts should not decide issues of procedural deficiency on constitutional grounds if any other avenues of decision are open, see Greene v. McElroy, 360 U. S. 474, 509 (1959) (concurring opinion); Ashwander v. TVA, 297 U. S. 288, 346-47 (1936) (concurring opinion), we believe that the constitutional issue must be faced here. It is true that plaintiffs not only invoke due process but also rely on the requirement of the Social Security Act, 42 U. S. C. § 602(a)(4) that

Appendix B—Opinion of United States District Court, Southern District of New York

> A State plan for aid and services to needy families with children must . . . (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness. . . .[26]

By interpreting the statutory phrase "fair hearing" in the context of pre-termination procedures,[27] we might have avoided the constitutional questions. See Greene v. McElroy, 360 U. S. 474, 496-97, 507-08 (1959). However, the command of the federal statute does not apply to state and local general assistance, for which no federal funds are provided. Six of the original and intervening plaintiffs [28] receive such assistance only; as to them the constitutional issue is squarely posed.

3. We must thus decide what specific procedural safeguards are constitutionally required for welfare recipients in a pre-termination proceeding. While the Supreme Court has been solicitous to assure "traditional forms of fair procedure" in administrative hearings, Greene v. McElroy, supra, 360 U. S. at 508, we do not believe that every person directly affected by administrative action must be afforded all of the procedural rights guaranteed in a full-fledged judicial trial. See, e.g., Dixon v. Alabama, 294 F. 2d 150, 159 (5th Cir.), cert. denied, 368 U. S. 930 (1961); cf. Hyser v. Reed, 318 F. 2d 225 (D. C. Cir.), cert. denied, 375 U. S. 957 (1963). Rather, we are called upon to determine what minimum procedural safeguards are required here in the context of the welfare system.

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[26] Cf. 42 U. S. C. §§ 302(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).

[27] See recent HEW regulation quoted at p. 6, supra.

[28] See notes 3, 4 supra and accompanying text.

IV

We turn first to the procedures provided under option (b) which is in effect in New York City. Option (b) provides for notice of "proposed discontinuance or suspension . . . together with the reasons for the intended action," and allows the recipient in response only to "submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued. . . ." The option does not envisage a personal appearance.

A hearing on a proposed termination of welfare benefits is, of course, a classic instance of determination of what have been called "adjudicative facts—facts pertaining to a particular party." 1 K. Davis, Administrative Law Treatise ¶ 7.20, at 506 (1958). If the right to a hearing in this context, fairly construed, means anything, it is literally the right to be heard. This is hardly a novel idea. In Londoner v. Denver, 210 U. S. 373 (1908), the Supreme Court specifically rejected the notion that permission to submit objections in writing comported with due process, and concluded that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." 210 U. S. at 386. See also Goldsmith v. U. S. Board of Tax Appeals 270 U. S. 117, 123 (1926). We do not deal here with the issue whether procedural due process requires the right to oral argument on a matter of law. See FCC v. WJR, 337 U. S. 265, 276 (1949). We have the different question whether a welfare recipient has the right to appear in person before the welfare agency to present his case. On a issue of such immediate and crucial impact as termination of welfare benefits, we conclude that the right to be heard means the right to

be heard in person. Defendants cite to us Morgan v. United States, 298 U. S. 468, 481 (1936), and Boston & Maine R.R. v. United States, 208 F. Supp. 661 (D. Mass.), aff'd mem., 371 U. S. 26 (1962). It is true that Morgan contained the dictum that "[a]rgument may be oral or written," 298 U. S. at 481, but we do not take that to mean that in this case there is no constitutional right to present evidence as opposed to argument, in person. Moreover, the case is clearly distinguishable on its facts.[29] In Boston & Maine, plaintiffs had had "a full opportunity to present their defense by oral and documentary evidence." 208 F. Supp. at 667.

Not only is the right to a personal appearance ordinarily implicit in the constitutional concept of a fair hearing, but the reality of the status of many welfare recipients makes the invitation to submit their cases in writing cruelly ironic. The burden of marshalling and writing down persuasive arguments in opposition to frequently vague or cryptic charges would discourage even a relatively well-educated layman. In fact, many welfare recipients clearly lack the education or sophistication either to understand the reason for their proposed termination or to prepare an adequate written defense.[30] Moreover, a review of the cases of the

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[29] *Morgan* was a challenge to administrative rate making; plaintiffs had had the opportunity to present oral argument on evidence before the agency in question; and the holding of the case was that decision could not be made by an officer who had not considered the evidence or argument. As to the subsequent treatment of *Morgan*, see W. Gellhorn & C. Byse, Administrative Law 1086-89 (4th ed. 1960).

[30] A recent study has established that only 57% of the mothers on welfare in New York City had attended high school at all; that only 1 of 6 had graduated; and that 1 of 6 had not even gone beyond fourth grade. See I. Cox, Families on Welfare in New York City, 6 Welfare in Review 22, 24 (1968).

individual plaintiffs in this action is persuasive that many of the disputes as to eligibility could have been easily resolved by an interchange of questions and answers between the recipient and the welfare official supervising the case. In the case of Mrs. Lett, for instance,[31] a conference about the facts of her employment with an impartial official might have quickly cleared up the misunderstanding and prevented the severe hardships that she suffered. Certainly the give and take of an informal hearing would be more likely to produce a just disposition than an attempt on her part to furnish a written rebuttal of her alleged "failure to disclose assets."

Even if the majority of welfare recipients were educationally equipped to write a clear statement of the reasons why they should not be terminated the very summary form of notice of proposed terminations makes an intelligent reply difficult.[32] Not only are the reasons given often incomprehensibly vague, but additional or wholly different reasons may in fact be behind the decision to terminate.[33] A personal hearing is necessary, if the recipient wishes it, both to explain to him the nature of the charges against him and to inform him of the evidence on which they are based. Indeed, the next most glaring deficiency of option

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[31] See pp. 10-12 supra.

[32] The charge of "failure to comply with Department resource policy" made to intervenor-plaintiff Sidor, for example, is virtually impossible to disprove without further information.

[33] The cryptic notice given intervenor-plaintiff Soto, for example, was "failure to attend rehabilitation C. O. C." The decision of the review officer, however, refers to quite different reasons—that Mr. Soto took drugs, was reported to be "a parasite" and "playing a game," and had frequently failed to cooperate.

(b) is its failure to require disclosure to the recipient of the real basis of the case against him. It merely provides for notice of proposed discontiuance "together with the reasons for the intended action." This procedure clearly falls far short of giving the recipient sufficient notice of the case against him so that he may ascertain its basis and contest it effectively. In Willner v. Committee on Character and Fitness, 373 U. S. 96, 107 (1963), the concurring opinion of Justices Goldberg, Brennan and Stewart states:

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence.

At least seven, if not all,[34] of the Justices agreed with this statement.

The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and

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[34] The dissenting opinion (Harlan, J., joined in by Clark, J.) held that the petition for certiorari should have been dismissed as improvidently granted, but characterized as "questionable" any holding that "an applicant for membership in the New York Bar may be denied admission without having had the opportunity at any stage to confront persons whose unfavorable information may have led the Character Committee to refuse to certify the candidate's 'character and fitness.'" 373 U. S. at 110.

produce evidence in rebuttal.[35] Moreover, in some instances at least, he must be permitted to meet the evidence against him by having questions put to the source of that evidence. There have been cited to us too many case histories in which welfare recipients have allegedly been cut off on the basis of untrue rumors and reports, as with Mrs. Velez, discussed above. We do not hold that the welfare recipient about to be terminated must be accorded the opportunity for confrontation and cross-examination in a formal manner, with the full panoply of a trial-type hearing, including testimony under oath. The right to face those providing harmful information and have them interrogated may be substantially achieved in an informal way, and we use the term "cross-examination" here in that less formal sense. Moreover, we are aware that such a requirement is time-consuming and if applied indiscriminately in every case might unduly delay administration of the entire welfare system. There will undoubtedly be many cases—perhaps a great many—in which the material relied upon by the welfare agency "appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant. . . ." Willner v. Committee on Character and Fitness, 373 U. S. 96, 108 (1963) (concurring opinion).[36] But where

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[35] See Bratton v. Chandler, 260 U. S. 110 (1922); Gonzales v. United States, 348 U. S. 407, 415 (1955); Dixon v. Alabama State Bd. of Educ., 294 F. 2d 150, 159 (5th Cir.) cert. denied, 368 U. S. 930 (1961); Parker v. Lester, 227 F. 2d 708, 716-17 (9th Cir. 1955).

[36] Intervenor-plaintiff Fuentes, for instance, was given notice of termination because "You have a large sum of money in the bank for which you were unable to give a satisfactory explanation." In such a case, an official statement from the bank would ordinarily be adequate to support the agency's claim. Again, the issue may be simply the proper application of agency regulations to an undisputed factual situation.

termination of benefits "depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded." Id.[37] It may be that something less would be appropriate in such a case if the welfare authorities could show an important interest in secrecy, cf. McCray v. Illinois, 386 U. S. 300 (1967), but no such interest has been demonstrated in any of the cases before us. We assume that any such situation would be the rare exception to be justified on the particular facts involved. We do not suggest that a "tip" or other confidential information may not properly trigger an investigation of a welfare recipient's eligibility. We hold only that when the decision is made to terminate benefits, the recipient must be afforded an opportunity to learn the evidence against him which the investigation turned up, if it was a basis of that decision, and when the value of that evidence turns upon a person's credibility, the recipient must have the opportunity to test it as set forth above. We realize that these requirements will duplicate the "fair hearing" post-termination procedure to some extent. However, any pre-termination hearing—even the type already put into effect by the state—also does that. Undue duplication is of course regrettable. However, we regard the informal conference envisioned here as quite different from a full-fledged trial-type post-termination "fair hearing" with testimony given under oath. In any event, in light of the shattering effect of wrongful termina-

[37] See Greene v. McElroy, 360 U. S. 474, 496-97 (1959); Gonzalez v. Freeman, 334 F. 2d 570, 578-80 (D. C. Cir. 1964); Hornsby v. Allen, 326 F. 2d 605, 608 (5th Cir. 1964); Rios v. Hackney, CA2-1852 (N. D. Texas, Nov. 30, 1967). But cf. Brown v. Gamage, 377 F. 2d 154 (D. C. Cir.), cert. denied, 389 U. S. 858 (1967), criticized in 20 Stan. L. Rev. 360 (1968).

tion of benefits upon a recipient, we believe that the procedures called for here are minimum requirements of due process.

Accordingly, therefore, we conclude that option (b) is constitutionally inadequate and that plaintiffs' application for a preliminary injunction against the use of the option in New York City must be granted. However, because argument has also been addressed to the legal sufficiency of the provisions of option (a) and because New York will be faced under our ruling with the need to substitute for option (b), we feel it is our obligation also to consider the constitutionality of procedures under option (a).

That option states that the notice of proposed termination shall advise the recipient that if he makes a request for review he will be afforded:

> opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, . . .

and at such a review, the designated welfare official shall:

> review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made.[38]

This language makes clear that option (a) does not suffer from some of the obvious inadequacies of option (b). Thus, option (a) does provide for a hearing in person,

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[38] See note 7 supra.

and, fairly construed, for disclosure to the recipient of the evidence against him. It is not clear whether the source of the evidence must be identified and the recipient thereafter given the right, in an appropriate case, to confront a person so disclosed and have him questioned. The regulation's silence on this point, when compared with the specificity of the state hearing procedure provided after termination,[39] might indicate that the recipient is denied such right. We have already ruled that this would be constitutionally invalid. Therefore, unless option (a) is construed to afford a recipient such right in an appropriate case, the procedure is improper. But in view of the newness of the regulation and the paucity of information given us on its use outside of New York City, we will not assume at this time that the right will be denied.

Plaintiffs have other objections to option (a), but to the extent that they have not already been dealt with, they do not require extensive discussion.[40] Implicit in what we have already said is the requirement that the decision of the reviewing offical must be based solely on evidence before him which has been made available to the recipient,

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[39] "Each party has a right to be represented by counsel, or other representative, to testify, to produce witnesses to testify, to offer documentary evidence, to cross-examine opposing witnesses, to offer evidence in rebuttal and to examine any documentary evidence offered by the other party." 18 NYCRR 84.13(c).

[40] HEW is apparently seeking clarification at this time from the New York Welfare Department on the grounds that the New York prior review procedure is not expressly available in cases of reduction of benefits as well as termination, as is required by the Handbook, Part IV, § 2300(d)(5)(1968). Since plaintiffs have not raised this issue, we do not consider it here.

except in the rare instance already discussed when there is an important interest in secrecy.[41] An objection is made to the notice requirement, but it is not persuasive. Option (a) requires notice in writing "at least 7 days prior to the proposed effective date of the discontinuance." We construe this to mean that the notice must be mailed at least seven days before such effective date. If so mailed, the notice is adequate.

The final objection to option (a) as written is that the welfare official reviewing the proposed termination of benefits is not impartial. Option (a) provides that:

> Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review.

This is obviously an attempt to have "review" of a supervisor's decision to terminate by someone more disinterested than he is. Since the review, however, is by another employee of the welfare agency, there is a possibility that the reviewing official will have had some prior official contact with the case. However, we are unable to say that the possible involvement of that official in aspects of a case prior to the review of proposed termination necessarily disqualifies him from conducting a fair hearing. Some degree of previous familiarity and informal contact with a case by a hearing officer is a common phenomenon in many administrative agencies. That the review officer is familiar with, or even has formulated opinions about, the facts of a case prior to review

[41] See p. 23 supra.

is not in itself sufficient to disqualify him.[42] However, plaintiffs argue that this reviewing officer is in practice frequently a case supervisor who has been consulted in advance for approval of proposed terminations and may even have initiated the recommendation to terminate. We would regard such a practice as a clear violation of the spirit of the requirement that the reviewing officer be superior to "the supervisor who approved the proposed discontinuance". In other words, the regulation meets the requirement of a fair hearing, but we expect the welfare department to enforce it strictly.[43]

In addition to their allegations of the insufficiency of the New York hearing procedures on their face, plaintiffs complain that the regulations themselves are frequently disregarded or improperly applied. They have offered evidence showing, for instance, that the notice often is not sent out within seven days of the proposed termination or before termination at all, that notices fail to state the full or real reasons for proposed termination, and that the review decision is frequently delayed unduly. We recognize that the transition to a new system of procedures, especially in an agency as large as the New York City Welfare Department, is not an easy task, and that it necessarily takes time to achieve full and smooth operation. Moreover, we are confident that the agency will make every

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[42] See NLRB v. Donnelly Garment Co., 330 U. S. 219, 236-37 (1947): "We find no warrant for imposing upon administrative agencies, a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." See also Pangburn v. CAB, 311 F. 2d 349, 356-58 (1st Cir. 1962); 2 K. Davis, Administrative Law Treatise ¶ 12.06, at 169 (1958); W. Gellhorn & C. Byse, Administrative Law 944-45 (4th ed. 1960).

[43] We also assume that a case supervisor who has become too deeply involved in a case conscientiously to undertake an impartial review can and will disqualify himself from that function.

effort in the future to insure that its own regulations and the requirements outlined in this opinion are carefully observed in practice. Finally, we are well aware that proceedings to compel state officials to comply with their statutory or regulatory duties should usually be brought in state courts,[44] and that supervision of a state administrative program is ordinarily an inappropriate role for a three-judge federal court. In view of all of these considerations and the fact that the plaintiffs before us are obtaining an injunction against use of option (b), the procedure which has been applicable to their terminations up to now, we will not now deal with these issues further.

V

With this disposition of the case, it is unnecessary to rule on plaintiffs' remaining statutory argument that by providing two options throughout the state for pre-termination procedure, the state violates the requirement of 42 U. S. C. § 602 (a) (1), that its plan, in effect, be uniform in the state. Apparently, defendants do not press before us various other arguments originally made before Judge Bryan, such as plaintiffs' need to exhaust available remedies administratively, or that the case is moot because most plaintiffs are now receiving public assistance on an emergency basis, or that a three-judge court is inappropriate here. Judge Bryan properly rejected these arguments in his opinion convening the three-judge court. F. Supp. at .

As to the first argument, see King v. Smith, 392 U. S. 309, 312 n.4 (1968). As to the second argument, the

[44] For instance, in an Article 78 proceeding in New York, N. Y. C. P. L. R. §§ 7801-06.

only development since Judge Bryan's decision is that some of these plaintiffs have received their post-termination state fair hearings. However, that this right was finally accorded to them months after their complaint was filed and after termination of benefits does not dispose of the case. Other plaintiffs are still threatened with termination without a proper hearing, and if we were required to do so, we would regard this as a class action, as plaintiffs request, as was done in Wheeler v. Montgomery, No. 48303 (N. D. Cal. April 17, 1968), appeal docketed, 37 U. S. L. W. 3152 (U. S. Oct. 22, 1968) (No. 634), relied on by defendants. Finally, Judge Bryan properly convened the three-judge court. The complaint obviously raised substantial constitutional issues. In addition, while option (b) may thus far have actually been in effect only in New York City, any or all local agencies could adopt it; it is thus validly a regulation of "general and state wide application". Moody v. Flowers, 387 U. S. 97, 101 (1967).

Finally, we emphasize again that we deal here only with procedural rights, not with whether a particular recipient of welfare is entitled to receive it. We are most aware that abuses of the welfare system do exist, and we do not minimize the need to keep welfare expense within manageable bounds. We do not suggest that welfare payments should be made to anyone not entitled to receive them. We hold only that a welfare recipient is entitled to certain minimum procedural protections before his payments are cut off or diminished. Providing those protections will, of course, help to insure fair individual treatment. In addition, it will have the more subtle, but equally important, effect of demonstrating that

fair procedures are available, thus protecting the rule of law in society, a not insignificant result.[45]

To sum up: We hold that a pre-termination hearing for welfare recipients is constitutionally required and that the procedures set forth above for such hearing are the constitutional minimum. Accordingly, we deny defendants' motion for summary judgment; we grant plaintiffs' motion for a preliminary injunction as to the operation of option (b), and deny it as to option (a), for the reasons and on the conditions stated herein. In addition, nothing herein is meant to affect the right to a post-termination hearing in accordance with the procedures already in existence. Plaintiffs also moved to dissolve an order of Judge Bryan's staying discovery pending disposition of the motions in chief. Since that discovery was primarily designed to prove that the various hearing procedures, even if constitutional on their face, were unconstitutional in their application, for the reasons already set forth we deny it. Plaintiffs' motion to amend the complaint in the consolidated case is granted, as is the motion of the twelve intervenors to intervene.

Settle order on notice; if defendants desire a stay pending appellate review, their proposed order should so provide.

WILFRED FEINBERG,
U. S. C. J.

FREDERICK P. BRYAN
U. S. D. J.

EDWARD C. MCLEAN
U. S. D. J.

Dated: New York, N. Y.
November 26, 1968

---

[45] See E. Wickenden, Administration of Welfare Rights, in National Conference on Law and Poverty, Proceedings 31, 36-37 (1965).

APPENDIX C

Regulation Involved

STATE DEPARTMENT OF SOCIAL SERVICES

Albany, New York

Pursuant to the provisions of sections 20 and 34 of the Social Services Law, I, George K. Wyman, Commissioner of Social Services, do hereby amend in part, as hereinafter indicated, Part 351 of Article 1 of Subchapter B of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR, effective immediately upon filing with the Secretary of State.

Section 351.26 is hereby Repealed and a new section to be section 351.26 is hereby added to read as follows:

351.26. Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official purposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to; the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the

state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relavent evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him

and the recommendation, if any of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or

other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

Date: April 26, 1968

Signed: GEORGE K. WYMAN
Commissioner

This is to certify that this is the original of an order of the State Department of Social Services, made on April 26, 1968, amending in part, Section 351.26 of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18, NYCRR.

Date: April 26, 1968

Signed: GEORGE K. WYMAN
Commissioner

APPENDIX D

Exhibit 1 to Commissioner Goldberg's Affidavit of June 14, 1968—Procedure No. 68-18

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

Subject: Clients' Right of Review in Cases of Proposed Suspension or Discontinuance of Assistance

To: Administrative Group Case Unit

Procedure No. 68-18 May 21, 1968
Classification 34 Replaces: P 68-15 (34)

Distribution: C Effective: Immediately

I. INTRODUCTION

A. *Purpose*: With the approval of the State Department of Social Services this procedure implements the new State policy which insures that the clients' rights are protected in cases where it is proposed that assistance be suspended or discontinued. This new policy in no way limits the client's right to request a Fair Hearing, in accordance with existing policy, and requires that assistance be continued until completion of the administrative review.

B. *Program*:

1. The State Department of Social Services has promulgated a new regulation which assures the client of the opportunity for a Department review by an employee who occupies a position superior to that of the employee who approved the proposed discontinuance or suspension of assistance. For purposes of this procedure, this employee shall be defined as the Review Officer.

2. In situations, *other than those listed below,* notification must be sent to the client of the intent to suspend or discontinue assistance seven (7) calendar days prior to the planned effective date of such action.

a. death of unattached person

b. admitted to institution (mental, penal, correctional, etc.)

c. client's request for discontinuance of assistance

d. client's whereabouts unknown and there is no forwarding address

e. client has left the State permanently

f. reclassification as to category

3. Upon receipt of information that the client requests an administrative review, the case shall be forwarded to the Review Officer along with all written material submitted by the client.

4. The Review Officer shall promptly review the case record, the recommendations of the Case Unit and the written material, if any, submitted by the client with his request for a review.

5. Immediately after such review, the Review Officer shall make an appropriate written determination as to whether or not assistance shall be discontinued, detailing the relevant facts and including all evidence submitted at the time of the review, as well as any reference to applicable provisions of the Social Services Law, Rules of the State Board of Social Welfare and Regulations of the State Department of Social Services, and approved local policy.

6. Based on the determination of the Review Officer, the Case Unit shall take appropriate action (to close or continue assistance) and notify the client of the determination by means of the appropriate letter.

C. *Forms Used*	*Title*	*Origin*
M-3c (New) 5/13/68	Notice of Intent to Suspend or Discontinue Assistance	Case Unit
M-3d (New) 5/13/68	Notice of Decision after Review to Continue Public Assistance	Case Unit
M-3h (Rev. 5/13/68)	Notice of Discontinuance of Public Assistance	Case Unit
M-3e (New) 5/13/68	Decision after Review to Discontinue Public Assistance	Case Unit

II. DETAILED INSTRUCTIONS

Caseworker

1. Records, in detail, discussion with the client and the reasons for the proposed suspension or discontinuance of assistance, including the appropriate closing code.

Caseworker

2. Prepares Form M-3c, "Notice of Intent to Suspend or Discontinue Assistance", in triplicate (two copies to be sent to the client and one copy to be retained in case record). Makes appropriate case record entry.

Note: On Form M-3c, the dates entered in Paragraphs 1 and 2 shall be identical.

Caseworker

3. Forwards case record and all copies of Form M-3c, together with a return envelope identified with caseload number, to Unit Supervisor.

Unit Supervisor

4. Reviews case record and Form M-3c. If in agreement, signs case record entry and Form M-3c. Arranges for immediate mailing of two copies to the client and retains one copy in case record. Controls Forms M-3c and date of their return on separate Form W-708, headed "Proposed Suspension or Discontinuance of Assistance".

Unit Supervisor

5. Reviews Form W-708 daily. If client fails to respond to Form M-3c, within the seven days provided or indicates agreement to have his case closed, instructs Caseworker to prepare the necessary forms for closing action in accordance with current procedure, using Form M-3h.

Unit Supervisor

6. If the client requests a review, makes appropriate entry on Form W-708; immediately forwards the case record with any written documents, relevant to the proposed action, submitted by the client, to the Review Officer.

Note: The Case Unit is responsible for all service to the client pending the review and receipt of the determination from the Review Officer either to close the case or continue assistance.

Review Officer

7. Immediately reviews the case record and written material, if any, submitted by the client, and prepares a memorandum, setting forth the relevant facts and his determination to continue or discontinue assistance, including any reference to applicable provisions of the Social Services Law, Rules of the State Board of Social Welfare and Regulations of the State Department of Social Services (see Appendix), and approved local policy.

a. If the determination is that assistance shall be continued, prepares the memorandum, in triplicate. Forwards original copy of memorandum with case record to the appropriate Case Unit; forwards duplicate copy of the memorandum to Center Director; retains third copy for own file.

b. If the determination is that assistance shall be discontinued or suspended, prepares memorandum, in quintuplicate. Retains one copy for own file; forwards original copy of memorandum with case record to the appropriate Case Unit; forwards three copies to the Director's office where one copy shall be retained in file, and two copies forwarded to the Fair Hearings Section, Central Office, one for the Commissioner's file and one for the State Area Office.

Unit Supervisor

8. On receipt of determination of the Review Officer, makes appropriate entry on Form W-708. Forwards case record and all material to the Caseworker for appropriate action and controls to insure prompt action.

Caseworker.

9. Takes appropriate action to continue or discontinue assistance; prepares appropriate letter to client with a copy to his attorney or representative, if any, and one copy to be retained in case record; makes case entry detailing action takes; prepares required forms to carry out appropriate action in accordance with current procedure.

LEGAL BASIS FOR CLOSING CASE

State Department Regulation 351.26 requires that after the review, the reviewing officer's decision shall include reference to applicable provisions of law, rules of the State Board of Social Welfare, regulations of the State Department of Social Services and approved local policy.

The Social Services Law, Board of Rules and Department regulations give the Commissioner authority upon completion of an investigation to suspend, increase, decrease or revoke a grant in cases where such action is based on the element of need, as follows:

SOCIAL SERVICES LAW

Section 134—"Such person shall be visited. . . ., in order that assistance or care may be given only in such amount and as long as is necessary. . . . " (All categories)

Section 214 (OAA)—" . . . the amount and manner of giving assistance may be changed or the assistance may be withdrawn if such official finds that the recipient's circumstances have changed sufficiently to warrant such action. It shall be within the power of the social services official at any time to cancel and revoke assistance for cause, as he may deem proper, . . . "

Section 286(2) (AB)—"The amount and nature of the assistance and the manner of providing it shall be determined by the social services official with due regard to the conditions existing in each case and in accordance with the regulations of the Department."

Section 303, subdivision (2) (AD)—"The amount and nature of the aid and the manner of providing it shall be determined by the social services officials with due regard to the conditions existing in the case in accordance with the provisions of this title, or other provisions of this chapter, the rules of the board and the regulations of the Department."

Section 350, subdivision 2 (ADC)—"allowances (a) shall not be granted for a period of longer than that prescribed by the rules of the board and regulations of the Department, subject to renewal from time to time.

(b) May be increased, decreased or revoked at any time."

Section 365a (MA)—"The amount, nature and manner of providing medical assistance for needy persons shall be determined by the social services officials. . . . in accordance with the local medical plan, the provision of the title (11), the rules of the board and regulations of the Department."

BOARD RULE

82.1(a)(1)—"Public assistance and care shall be granted only so long, and in such form and amount, as is necessitated by the needs of the recipient in the light of his resources." (All categories)

STATE DEPARTMENT REGULATIONS

351.22(c)—"When an agency verifies ineligibility or a change in degree of need, action shall be taken immediately

to reduce, increase, or discontinue the grant for the next payment period possible under existing payment procedure." (All categories)

For those closings where there is ineligibility for reasons other than need, in addition to the foregoing, the following references to law, rule or regulation may be included:

Closing Codes		
40-47	Social Services Law 285 State Department Regulation 368.2(i)	AB
	Social Services Law 302 State Department Regulation 368.2(j)	AD
	Social Services Law 349 Board Rule 80.1 State Department Regulations 369.2, 369.3 "Policies Governing the Administration of Public Assistance", Section 32	ADC and T-ADC
48 and 49	Social Services Law 131 (4) State Department Regulations 351.3 and 369.2 (7)	
50	Social Services Law 131 (4) State Department Regulations 251.3 and 368.2	
53	Social Services Law 321, 360 State Department Regulation 352.8 "Policies Governing the Administration of Public Assistance", Chapter VI	

Appendix D—Exhibit 1 to Comm. Goldberg's Affidavit

Closing Codes	
54	Social Services Law 134a State Department Regulation 351.7
55	State Department Regulation 351.2 "Policies Governing the Administration of Public Assistance", Section 165
57	Social Services Law 131 (5b), 350b State Department Regulations 351.3, 369.2(7)
58	State Department Regulation 351.1
59	Social Services Law 352 State Department Regulation 369.1 (b)
99	Contact Legal Division
56	Where there is a continuing need, there is no legal basis for closing a case for misuse of funds. State Department Regulation 352.5 (n) (1) provides for duplication of a grant in whole or part when the original check or proceeds were allegedly lost, stolen, or diverted to other purposes, when the health and safety of the recipient would be threatened by a failure to replace. Consideration should be given to restriction of a grant, or transfer to some other form of assistance or care.

Appendix D—Exhibit 1 to Comm. Goldberg's Affidavit

(Emblem)

(Letterhead of)

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE

Case Number

This is to advise you that this Department intends to ☐ Suspend ☐ Discontinue your public assistance grant , for the following reasons:

If you feel that your public assistance grant should not be suspended or discontinued, you may request a review of your record by a Review Officer on or before .

You may also submit any statement or document which may establish your need for public assistance. You have the right to submit this written material through an attorney or any representative of your choosing.

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No. 1: ☐ I request a Review

Box No. 2: ☐ I do not request a Review

Appendix D—Exhibit 1 to Comm. Goldberg's Affidavit

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

If, after this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N. Y. 10007, Telephone Number 488-6550.

[Here follows a Spanish Translation of the same]

(Emblem)

(Letterhead of)

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

NOTICE OF DECISION, AFTER REVIEW,
TO CONTINUE PUBLIC ASSISTANCE

After careful consideration of all the factors and documents you presented, we are in agreement that you are still eligible to receive public assistance.

Please inform your Caseworker of any change in your circumstances that affects your need for assistance.

[Here follows a Spanish Translation of the same]

Appendix D—Exhibit 1 to Comm. Goldberg's Affidavit

(Emblem)

(Letterhead of)

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

NOTICE OF DISCONTINUANCE OF PUBLIC ASSISTANCE

(Prepare in Duplicate)

Our investigation shows that effective immediately you are not eligible to receive _____ for the following reasons:

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway, New York, N. Y. 10007, Telephone Number 488-6550.

You will soon receive information concerning your eligibility for continued assistance under the Medical Assistance Program as provided by the New York State Medicaid Program.

[Here follows a Spanish Translation of the same]

Appendix D—Exhibit 1 to Comm. Goldberg's Affidavit

(Emblem)

(Letterhead of)

THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

NOTICE OF DECISION, AFTER REVIEW, TO DISCONTINUE PUBLIC ASSISTANCE

Case Number

After careful consideration by a Review Officer of all the factors and documents you presented, it has been decided that effective immediately you are not eligible to receive _____ for the following reasons:

You may wish to review the pamphlet which was given to you at the time of your application. It explains the provisions under which this type of public assistance is granted and your rights with respect to review of this decision.

If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway, New York, N. Y. 10007, Telephone Number 488-6550.

You will soon receive information concerning your eligibility for continued assistance under the Medical Assistance Program as provided by the New York State Medicaid Program.

[Here follows a Spanish Translation of the same]

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 8 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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INDEX

PAGE

Questions Presented 1

Statement of the Case 2

ARGUMENT:

I. The regulation found invalid below is plainly invalid under the prior decisions of this Court 7

II. *Kelly* v. *Wyman* and *Wheeler* v. *Montgomery* (No. 634) appear to be in conflict and should be heard together 11

CONCLUSION 12

TABLE OF CASES, STATUTES AND AUTHORITIES CITED

Cases:

Armstrong v. Manzo, 380 U. S. 545 (1965) 8

Bible v. Smith, No. 706,263 (Super. Ct., King Co., Wash., March 21, 1969) 9

Camerena v. Department of Public Welfare, 449 P. 2d 957 (Ariz. Ct. App. 1969) 9

Greene v. McElroy, 360 U. S. 474 (1959) 8

Kwong Hai Chew v. Colding, 344 U. S. 590 (1953) 8

Londoner v. Denver, 210 U. S. 373 (1910) 8

PAGE

Matter of Duffy v. Wyman, —— M. 2d ——, 297 N. Y. S. 2d 77 (Sup. Ct. 1968) 6

McCullough v. Terzian, No. 379011 (Super. Ct., Alameda County, May 12, 1968) 9

Moore v. Houston, No. 104435 (Cir. Ct., Wayne Co., Mich. Nov. 1, 1968) 9

Morgan v. United States, 304 U. S. 1 (1937) 8

North American Cold Storage Co. v. Chicago, 211 U. S. 306 (1906) 8-9

Opp Cotton Mills v. Administrator, 312 U. S. 126 (1941) 8

United States v. Illinois Central R.R., 291 U. S. 457 (1934) 8

Wheeler v. Montgomery, No. 634, O. T. 1968 1,5

United States Constitution:

Fourteenth Amendment 7

Regulation:

18 N. Y. C. R. R. §351.26 4,5,6,7

Federal Statute:

42 U. S. C. §602(a)(4) 3

State Statute:

New York Social Service Law §145 3

PAGE

Other Authorities:

Federal Register, January 24, 1969, p. 1144 3

Morris, Welfare Benefits as Property: Requiring a Prior Hearing, 20 Admin. L. Rev. 487 (1968) 9

Note, Eligibility Determination in Public Assistance, 115 U. Pa. L. Rev. 1307 (1967) 3

Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L. J. 1235 (1967) 9

U. S. Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sec. 6200(j) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1120

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee moves the Court to affirm the judgment sought to be reviewed on the appeal, or, in the alternative, to note probable jurisdiction and set this case down for argument with *Wheeler* v. *Montgomery,* No. 634, O. T. 1968, on the grounds set forth below.

Questions Presented

1. Whether a local welfare department, having found after fulsome investigation an individual or family to be in extraordinary need and in all other respects eligible for public assistance, and having accordingly provided a regular recurring public assistance grant for food, clothing,

shelter, and medical services, may, consistent with procedural due process of law, redetermine eligibility *ex parte* and abruptly withdraw the subsistence grant without affording the individual so affected an adequate and timely opportunity to be heard on the highly controvertible issues underlying the decision to terminate?

2. Whether the hearing requirements of procedural due process of law are satisfied by an opportunity limited to

(1) a request in writing of the case unit making the initial decision to terminate for a review of the case record (an *ex parte* record prepared exclusively by that case unit), and

(2) a submission forthwith in writing of a letter or other "document" showing why the decision to terminate should not be implemented,

in the absence of any effective apprisal of the real reasons for termination, of the evidence and sources of evidence supporting such determination, and in the absence of any opportunity to confront and put questions to those supplying such crucial evidence?

Statement of the Case

Appellees herein are recipients of residual public assistance grants under the federally financed Aid to Dependent Children program, governed by Title IV of the Social Security Act and H. E. W. regulations thereunder, and the State and locally financed Home Relief program, governed exclusively by the New York State Social Services Law.[1]

[1] The United States Department of Health, Education and Welfare, recognizing the gross ineffectiveness and inadequacy of pro-

Both programs provide a semi-weekly recurring grant of money for shelter, clothing and food costs for persons who meet the intricate statutory qualifications and are wholly without resources or another source of support. As a condition of receiving such aid, persons applying must denude themselves at the outset of all resources (save for daily essentials) and must turn over or account for any other income.[2] They are also obliged, under penalties of fraud, to report any changes in circumstances affecting need and eligibility. New York Social Services Law §145.

The Appellees herein were each found after investigation and verification to be without resources and otherwise fully eligible to receive subsistence grants, and regular recurring grants were paid. Some time thereafter their case unit (comprised of a case worker, unit supervisor and case supervisor), based on an *ex parte* investigation, unsolicited reports, and at times apparent hostility, determined them to be no longer eligible for public assistance. Plaintiffs were so notified, with a conclusory and impenetrable statement of the reason, such as excessive resources,

---

viding the statutorily mandated trial-type "fair hearing," 42 U. S. C. §602(a)(4), long after aid has been terminated, requires, as of October 1, 1969, that states provide the statutory hearing prior to termination or reduction of aid. *Federal Register*, January 24, 1969, p. 1144. This prospective regulation will require continuation of benefits pending the state "fair hearing" for appellees herein in the ADC category as of October 1, 1969, but will provide no legal protection to appellees in the locally financed Home Relief category. Hence procedural due process of law remains the exclusive source of authority for their claim.

[2] See generally, Note, *Eligibility Determination in Public Assistance*, 115 U. Pa. L. Rev. 1307 (1967). The determination of eligibility under these programs also satisfies the primary condition of eligibility for the federally financed Medical Assistance Program found in Title XIX of the Social Security Act and Regulations thereunder.

failure to cooperate, and the like, and their regular recurring grant for food, shelter and medical treatment was abruptly terminated.

Some of the plaintiffs pursued New York's so-called "fair hearing" before a referee of the State Department of Social Services, which hearing often occurred from thirty to sixty days after request and which hearing provided a determination from thirty to ninety days and even more after the hearing was held. Others of the plaintiffs, with the help of an attorney, attempted to use the so-called written review procedure found in Title 18, N. Y. C. R. R. §351.26(b), contained in Appendix C to the Jurisdictional Statement and the regulation at issue on this appeal. Meanwhile the plaintiffs sought, too often unsuccessfully, to ascertain the reasons informally, to obtain private aid during the dilatory hearing process and, through their attorneys, to stave off evictions, to obtain emergency assistance, to find housing, and generally to ameliorate the drastic consequences of erroneous cut-offs.

They also commenced this suit to compel a timely mechanism of review to subject the controvertible and often unsubstantiated factual surmises underlying the decision to terminate to examination and rebuttal before the impact of erroneous withdrawal of the grant. The state defendant in this action, Commissioner Wyman of the New York State Department of Social Services, thereupon promulgated a regulation, now 18 N. Y. C. R. R. §351.26(a), set forth in Appendix C to the Jurisdictional Statement, requiring an in-person hearing before the local department prior to termination. This procedure was upheld by the court below.

But this procedure was unacceptable to the City of New York, and after ignoring the state regulation for months

while terminations continued apace, the City finally prevailed on the State to permit the radically different procedure contained in §351.26(b), which was found to be invalid below [hereinafter referred to as "option (b)"].

The proofs below, including affidavits on behalf of the Defendant City and State Commissioners required by the Court, establish the following facts:

Under option (b) the client could request his case supervisor to review the case record during the seven-day period before withdrawal, that record being compiled wholly by the members of the case unit including the case supervisor undertaking the review. The recipient was also allowed within a two or three day period to prepare and submit written evidence or documents contesting the decision to terminate in response to a form notice which did not provide any explanation of the reasons for the proposed action and did not disclose the evidence or indeed the factual allegations or surmises underlying the termination. The written notice under option (b) ranged from "failure to attend rehabilitation C. O. C." to "refusal to cooperate with department policy" [3] and often obscurely cloaked the actual reason for termination. The review officer was the case supervisor in the client's case unit, an official shown often to be deeply involved in the case and the particular decision to terminate. Indeed the case supervisor or his superior often initiates the termination.

The statutorily required fair hearing has been conducted in termination cases 20 to 260 days after request,

[3] The latter notice was sent to a recipient almost half a year after the City implemented option (b) and is contained in Appendix D to the Brief *Amici Curiae* of the Columbia Center, et al. in *Wheeler* v. *Montgomery*, No. 634.

and decisions most often have been rendered some 65 to 195 days later. Although federal regulations require that decisions be rendered within 60 days after the request for a fair hearing,[4] the State's 1968 statistics submitted to the court below indicate that only 2 to 8% of the decisions rendered in all cases each month were rendered in sixty days or less, and 39 to 82% were rendered after more than ninety days had passed. No aid was afforded during the hearing process, and only months after this action was commenced (and then only under federal mandate) did New York afford full retroactivity. Figures showing reversals in these hearings revealed an extraordinary margin of error in the initial decision to terminate, at times exceeding one out of three appeals.

Appellees also referred to recent studies demonstrating that many welfare recipients are ashamed to be on welfare and think that their caseworkers do not wish to be questioned or bothered. Education of recipients rarely goes beyond early high school. Most are totally without legal representation and without any skills of written advocacy.

The Court found §351.26(b) in these circumstances an illusory or "cruelly ironic" remedy for meaningful review of the decision to withdraw the public assistance grant on which recipients so desperately depend.

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[4] U. S. Department of Health, Education and Welfare, *Handbook of Public Assistance Administration*, Part IV, Sec. 6200(j). No adequate remedy exists for enforcement of the state or federal timing requirements for statutory hearings. The state rules are directory, not mandatory. *Matter of Duffy* v. *Wyman*, —— M. 2d ——, 297 N. Y. S. 2d 77 (Sup. Ct. 1968), and H. E. W. is for all practical purposes without means of obtaining compliance, save for uncertain and protracted negotiations over a course of years.

ARGUMENT

I.

The regulation found a denial of due process below is plainly invalid under the prior decisions of this Court.

On the narrow question presented by both the decision of the court below and the principal argument New York City tenders to this Court, the decision below is manifestly correct and poses no issue worthy of plenary review in this Court. That question is whether the procedural due process requirement of an adequate and timely hearing for review of a determination to withdraw a grant is satisfied by §351.26(b), drafted and defended only by the City of New York, which allows but an opportunity to request another look at the case record by one involved in the initial decision to terminate, and an opportunity to submit, rather hastily, something in writing in response to a cryptic or conclusory statement of the alleged reason for termination. As the proofs below indicated, the statement, even if penetrable, often has nothing to do with the real reasons for termination, and in no case discloses the actual case against the recipient and the source of the evidence or rumor leading a case worker and his supervisors to believe the recipient is no longer eligible. The real question here is whether in the context of the welfare system such a mechanism is equivalent to a hearing within the intendment of the Fourteenth Amendment.

The answer given below is clear and plainly accords with the prior decisions of this Court that an opportunity to be heard presupposes (1) disclosure of the case against

the individual relied on to justify administrative action and (2) an opportunity to meet that case through the submission of evidence and, equally important, particularly here, an opportunity to put questions to the source of the evidence. As the court below made abundantly clear, we do not speak of the formalities of a judicial trial or indeed the formalities of any proceeding. What is required is only the substance of the right of apprisal of the actual case against an individual contesting a determination made about him, which means revelation of the evidence and its sources, and the right to contest the credibility of those supplying the crucial evidence and to submit one's own evidence before a review officer not involved in the initial decision.

As the court below found, "this is hardly a novel idea." This Court said some time ago, "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief and, if need be, by proof, however informal." *Londoner* v. *Denver,* 210 U. S. 373, 386 (1910). Significantly for the instant case, this Court also held then that the plaintiff had the right to be heard "before the tax became irrevocably fixed." 210 U. S. at 385. This right to be heard on the evidence prior to the implementation of an adverse decision has been reaffirmed through the years. *United States* v. *Illinois Central R.R.,* 291 U. S. 457, 463 (1934); *Morgan* v. *United States,* 304 U. S. 1, 18-19 (1937); *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126 (1941); *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 597 (1953); *Greene* v. *McElroy,* 360 U. S. 474 (1959); *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965). To be sure, hearings subsequent to administrative determinations have been permitted under certain emergency conditions (see, e.g., *North American*

Cold Storage Co. v. *Chicago,* 211 U. S. 306 (1906)). But there plainly are no compelling interests here to invoke this exception. The minimal pecuniary interest of the State is insignificant compared to the plight of plaintiffs, deprived for months of their only source of subsistence. The subsequent fair hearing, no matter how thorough, cannot remedy or ameliorate the irremediable harms of erroneous decisions to terminate assistance.[8]

The City procedure represents to our knowledge the only wholly written review process known to administrative law, and it does so in the welfare context in which it is truly and "cruelly ironic." Characteristics of welfare administration generally and of recipients reveals the illusory, if not to say sham, nature of New York City's response to this lawsuit.

The structure and operation of the welfare system maximizes the danger of erroneous and arbitrary administrative action. Public assistance is a highly complex administrative program, involving a federal statute and HEW regulations (some published in the Federal Register, others in the Handbook of Public Assistance Administration, and others in "State Letters"), state statutes, state board rules, and state and local regulations. At the same time standards

[8] The right of a welfare recipient to a hearing prior to termination is being recognized by a growing number of state courts faced by the problem for the first time. *McCullough* v. *Terzian,* No. 379011 (Super. Ct., Alameda County, May 12, 1968) (state-wide injunction); *Moore* v. *Houston,* No. 104435 (Cir. Ct., Wayne Co., Mich. Nov. 1, 1968) (state-wide consent decree); *Camerena* v. *Department of Public Welfare,* 449 P. 2d 957 (Ariz. Ct. App. 1969); *Bible* v. *Smith,* No. 706,263 (Super. Ct., King Co., Wash., March 21, 1969) (declaration of unconstitutionality and injunction for named plaintiffs). See also Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1235 (1967); Morris, *Welfare Benefits as Property: Requiring a Prior Hearing,* 20 Admin. L. Rev. 487 (1968).

and procedures are frequently vague or in conflict on crucial questions affecting recipients, leaving the answers to individual caseworker discretion or interpretation.

The pervasive requirements in these programs for establishing and re-establishing need, detailed and severe income and resource restrictions, broad requirements of disclosure, and extensive behavioral and moral constraints, all open up an extremely broad range of inquiry and entail persistent investigation of recipients. Recipients, often illiterate and inarticulate and generally without access to legal assistance, are persons involved in a very unequal relationship with a caseworker and agency possessing enormous discretionary power, ranging from authorization of special grants for clothing and special diets to termination of the entire regular grant. Cooperation, information and response are often assumed as a matter of right by the caseworker, whose demands are backed up by the power to terminate. The welfare system must also acknowledge excessive caseload handled by an inadequate, overworked and insufficiently trained staff, as well as haphazard and spotty investigations. Couple with these factors local political pressures, the political impotency of recipients, a deep suspicion of welfare recipients, and the danger of arbitrary governmental action is indeed grave. Contrary to the City's intimations, these facts are not altered by the existence of the new procedure, nor are they in any way alleviated by the opportunity to write a letter of protest. On this issue alone the decision below is manifestly correct.

II.

Kelly v. _Wyman_ and _Wheeler_ v. _Montgomery_ (No. 634) appear to be in conflict and should be heard together.

New York City seeks to avoid the inescapable answer above by asserting a conflict between the decision below and that in *Wheeler* v. *Montgomery*. Although it is not accurate to say that the New York City procedure found invalid below is similar to or identical with that upheld in *Wheeler*, it is fair to say that the decision of the two three-judge panels cannot be harmonized or reconciled. The court in *Kelly* examined not only New York City's special procedure, but also the procedure obtaining in the rest of the State. It found the latter constitutional only after interpreting it to require:

(a) Notice of the true reasons for the termination, clearly stated.

(b) An opportunity to appear "in person", so that the nature of the charges and the evidence may be revealed, and to produce evidence in rebuttal.

(c) "Where termination of benefits 'depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination . . .'"

(d) A "decision of the reviewing official . . . based solely on evidence before him which has been made available to the recipient . . . "

(e) A review officer "who has [not] become too deeply involved in a case conscientiously to undertake an impartial review".

The court in *Wheeler* did not undertake such an examination of the California procedure but rather dismissed the complaint in the face of serious objections to the lack of confrontation, cross-examination, apprisal, and impartiality of the hearing officer under the California procedure. On the broad questions involved in both cases—the scope and extent of due process requirements in welfare hearings—the decisions are in conflict. As we said in our *amicus* brief in *Wheeler*, in light of the record developed in *Kelly* for resolution of these constitutional questions and the inescapable effect of this Court's holding in *Wheeler* on the decision in *Kelly*, these cases should be heard together. On that basis, Appellees herein do not oppose this Court's noting probable jurisdiction.

CONCLUSION

Appellees' motion to affirm should be granted or, in the alternative, probable jurisdiction should be noted and the case set down to be heard along with *Wheeler* v. *Montgomery*, No. 634.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Regulation Involved	2
Question Presented	5
Statement of the Case	6
ARGUMENT—A regulation which requires reasonable notice prior to termination of welfare benefits, gives a welfare recipient with the right to legal counsel an opportunity to present any written evidence or reasons as to why benefits should not be terminated and continues benefits until a decision is reached meets the requisite standards of due process of law particularly where a review of the decision under more formal procedures is readily available	9
Conclusion	19

CASES CITED

Cafeteria and Restaurant Workers Union v. McElroy, 367 U. S. 886 (1961)	9
Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961)	9, 10
Federal Communications Commission v. W. J. R., 337 U. S. 265 (1949)	10
Hanah v. Larche, 363 U. S. 420 (1966)	9

PAGE

Madera v. Board of Education of City of New York, 386 F. 2d 778 (2nd Circ., 1967) cert. denied 390 U. S. 1028 (1968) 10

Phillips v. Commissioner, 283 U. S. 589 (1931) 10

Reaves v. Ainsworth, 219 U. S. 296 (1911) 9

Snell v. Wyman, 281 F. Supp. 853 (D. Ct., N. Y. 1968), affirmed 393 U. S. 323 (1969) 12

United States v. Wood, 61 F. Supp. 175 (D. Ct., Mass., 1945) 10

Wheeler v. Montgomery, et al (Northern District of California, No. 48303, April 17, 1968, appeal docketed, 37 U. S. L. W. 3152, Oct. 22, 1968, No. 634 17,18

STATUTES CITED

United States Constitution:

Fourteenth Amendment 6

28 United States Code:

Section 1253 2

Section 2281 2

Section 2284 2

42 United States Code:

Section 301, et seq. 6

Section 1983 2,6

New York Civil Practice Law and Rules:

Article 78 8

PAGE

Social Service Law:
§ 104 12
§ 360 12

New York Civil Service Law:
Section 75 18

New York Education Law:
§ 2573(7) 18

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351.26 .....1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 15
352.5 8

New York City Department of Social Services Procedure No. 68-18 .....8, 13, 16

United States Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part IV—6000-6400, as amended on February 8, 1968 in Handbook Transmittal No. 140 8

IN THE

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No. 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

Appellant appeals from an order (393a-395a) of the United States District Court for the Southern District of New York granting appellees' motion for a preliminary injunction staying all proceedings under 18 Codes Rules and Regulations of the State of New York 351.26(b), relating to the termination of benefits to persons receiving public assistance, and denying appellant's motion for a summary judgment dismissing the complaints in these consolidated actions.

Appellant's jurisdictional statement was filed on March 6, 1969. This Court noted probable jurisdiction on April 21, 1969.

Opinion Below

The opinion of the District Court is reported at 294 F. Supp. 893 (S.D.N.Y. 1968). It is set out in The Appendix at pp. 365a-392a.

Jurisdiction

This appeal is taken pursuant to title 28 of the United States Code, Section 1253.

In their complaints (10a-28a; 66a-75a; 167a-200a), appellees, who are welfare recipients in New York City, sought the convening of a three-judge court and declaratory and injunctive relief under the Civil Rights Act, Title 42 United States Code, Section 1983. A three judge court was convened pursuant to Title 28 United States Code, Sections 2281 and 2284. Thereafter, on November 26, 1968 the three judge court issued its decision granting appellees' motion for a preliminary injunction and denying appellant's motion for a summary judgment. The order appealed from was issued on December 13, 1968. The text of the order is set forth at pp. 393a-395a of the Appendix. Appellant's notice of appeal to this Court was filed in the Southern District of New York on January 6, 1969.

Regulation Involved

Title 18 N.Y.C.R.R., Section 351.26, is the regulation involved on this appeal. That section provides as follows:

STATE DEPARTMENT OF SOCIAL SERVICES

Albany, New York

351.26. Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official pur-

poses to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:

(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to; the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When a recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the

proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may

not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

Date: April 26, 1968

Questions Presented

Does a regulation which

1. requires seven days' notice to beneficiaries of public assistance of an intent to terminate benefits,

2. provides that the reasons for the proposed termination be set forth in the notice,

3. affords beneficiaries an opportunity to obtain a review of the proposed action and to submit any written statement or other evidence to demonstrate why this grant should not be terminated,

4. mandates that the reviewing officer be a person in a superior position to the supervisor who approved the proposed termination, and

5. continues public assistance until the review is completed

comply with due process of law particularly in light of the facts that (a) a subsequent fair hearing is available to review any errors that may occur and (b) any benefits improperly withheld will be restored?

Statement of the Case

This action was brought by appellees, who are recipients of public assistance, for a declaratory judgment and for an injunction. They sought a declaration that the regulation (New York State Department of Social Services, Regulation, § 351.26) governing the termination of public assistance, provided pursuant to Title 42 of the United States Code and the Social Welfare Law of New York, is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution and is otherwise unlawful in that it violates the Social Security Act. Specifically, appellees asserted that the regulation fails to provide for adequate notice and an opportunity for a hearing which satisfies standards of due process of law prior to termination or suspension of public assistance.

They also sought and the court below granted an injunction restraining defendants from terminating or sus-

pending public assistance prior to a hearing of a type which the appellees regarded as necessary to meet standards of due process of law. Appellees claimed that they and persons similarly situated have been or may be unconstitutionally deprived of public assistance under the procedures challenged.

The applicable regulation (Section 351.26) of the New York State Department of Social Services was amended after this action was commenced but prior to the convening of the three judge court. The present regulation is set forth in full *supra* and is in the Appendix at pp. 127a-130a.

Under the State regulation, the Commissioner of Social Services of New York City had the option of following a State procedure for termination of benefits (§ 351.26[a]) or adopting local procedures which comply with the standards of § 351.26(b). Defendant Goldberg elected to proceed under § 351.26(b), and he presented a plan under that section which was approved.

New York City adopted local procedures to carry out its obligations under § 351.26(b) which became operational on May 27, 1968. These procedures (No. 68-18) are set forth in Exhibit "1" to Commissioner Goldberg's affidavit of June 14, 1968 (147a-149a).

Thus, in order to consider the questions presented here the Court should examine the text of § 351.26 as implemented by New York City in its Procedure No. 68-18.

The present procedure for termination of public assistance in New York City involves the following steps: (1) discussion by a caseworker with a client as to reasons for proposed discontinuance of assistance; (2) report by caseworker to his unit supervisor; (3) approval by unit supervisor of proposed discontinuance; (4) a notice of proposed discontinuance with the reasons therefor sent to the client. The notice also advises the client

that he may request a review of the proposed discontinuance within seven days and that he may submit any statement or document in writing, personally or through an attorney or any other representative to show his continued eligibility to receive public assistance. (5) Where a review is requested, a review officer, who is superior in position to the unit supervisor, reviews the case record and any material submitted by the client. Assistance is not terminated unless and until the review officer makes a decision adverse to the client. (6) If the decision is to discontinue assistance, the case record is returned to the unit supervisor and, in turn, to the caseworker who sends written notice of the decision to the client. This notice states the reasons for discontinuance and advises the client of his right to a Fair Hearing. (7) Thereafter a Fair Hearing before State officials will be held if requested and, if the result is adverse to the client, the determination is subject to judicial review under Article 78 of the New York Civil Practice Law and Rules. Federal and New York State regulations require that, where an incorrect decision is made adverse to the client, the agency must make corrected payments retroactive to the date the incorrect action was taken (322a-323a).

The procedure just outlined is derived from Regulation 351.26 and 352.5 of the New York State Department of Social Services; Procedure No. 68-18 of the New York City Department of Social Services; and United States Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part IV—6000-6400, as amended on February 8, 1968 in Handbook Transmittal No. 140.

ARGUMENT

A Regulation Which Requires Reasonable Notice Prior to Termination of Welfare Benefits, Gives a Welfare Recipient with the Right to Legal Counsel An Opportunity to Present Any Written Evidence or Reasons as to Why Benefits Should Not Be Terminated and Continues Benefits Until a Decision Is Reached Meets the Requisite Standards of Due Process of Law Particularly Where a Review of the Decision Under More Formal Procedures Is Readily Available.

(1)

The formalities of judicial proceedings are not required at every stage of the administrative process, particularly where judicial review is available to correct error. "The requirements of due process frequently vary with the proceeding involved." *Hannah* v. *Larche,* 363 U. S. 420, 440 (1960). "What is due process of law must be determined by circumstances." *Reaves* v. *Ainsworth,* 219 U. S. 296, 304 (1911); *Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150, 155 (1961).

In *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886 (1961), the court stated (pp. 894-895):

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. * * * The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation. [citations omitted] '"[D]ue process", unlike some legal rules is not a technical conception with fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions * * *.' *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 162-163 (concurring opinion)."

Oral presentations are not invariably required. In *Federal Communications Commission* v. *W. J. R.*, 337 U. S. 265 (1949), the court said (p. 275):

> "[D]ue process of law has never been a term of fixed and invariable content. This is true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner* v. *Denver*, 210 U. S. 373, in others that argument submitted in writing is sufficient. *Morgan* v. *United States*, 298 U. S. 468, 481."

Similarly the participation of legal counsel is not always required in administrative proceedings. *Madera* v. *Board of Education of City of New York*, 386 F. 2d 778 (2nd Circ., 1967), cert. denied 390 U. S. 1028 (1968); *Dixon* v. *Alabama State Board of Education, supra.*

Under appropriate circumstances it is permissible for the government to act first and conduct all review proceedings later. In *Phillips* v. *Commissioner*, 283 U. S. 589 (1931), the court stated (pp. 595-597):

> "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.
>
> * * *
>
> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

In *United States* v. *Wood*, 61 F. Supp. 175 (D. Ct., Mass., 1945), the court stated (p. 179):

"It is clear that, when administrative action is taken in an adversary proceeding without affording adequate notice and opportunity to defend to interested parties, basic constitutional rights are invaded • • • This does not mean that the hearing must invariably precede the administrative action. Where considerations of administrative expediency weigh heavily, and where opportunity for a full and adequate hearing is available within the administrative process, no fundamental rights are transgressed when the hearing follows, rather than precedes, the action of the administrative agency."

This Court, as illustrated above, has not defined "due process" as a set of rigid rules applicable regardless of the circumstances. Where private rights of life or liberty are in jeopardy, as in criminal proceedings, strict adherence to procedural safeguards is necessary. Where, however, the action in question is administrative in nature, subject to later judicial scrutiny, flexibilty of procedure appropriate to protect both the individual and the state is permissible.

(2)

There are hundreds of thousands of persons receiving public assistance in New York City. The cost of the program is enormous. The New York City Budget for 1966-67 provided $587,807,056 for public assistance (The City Record, 6/30/66, p. 52). For 1967-68 the figure was $839,155,551 (*id.* 6/29/67, p. 75). There is no reason to assume this figure will decline in the immediate future. There are obviously thousands of personal tragedies behind the statistics of public assistance. The need for aid is acute and in many cases chronic. The individual cases rightfully should elicit compassion, understanding and

financial aid. A civilized society should do no less and probably should do much more than has been done to date.

This does not mean, however, that the program adopted by the legislature and supported by hundreds of millions of dollars should be administered without some regard for fiscal and administrative control. Some people apply for assistance who are not eligible. Some who are eligible later become ineligible and must be removed from the rolls.

In *Snell* v. *Wyman*, 281 F. Supp. 853, 859 (D. Ct., N. Y., 1968) affirmed 393 U. S. 323 (1969), former Commissioner of Welfare Mitchell Ginsberg testified that his office had "a dual responsibility. One is to the client and the other is to the accountability of the appropriate use of the public funds." The *Snell* case challenged the constitutionality of the recovery provisions of the Social Service Law (§§ 104, 360) and regulations. In sustaining the statute the court stated (p. 865):

> "Urging that the statutes be erased sweepingly on their face, plaintiffs ignore the fact that the discretion conferred upon administrators is subject to test and check both in administrative 'fair hearings' • • • and on judicial review under N. Y. CPLR Article 78."

(3)

The court below was properly concerned about the condition of welfare recipients and the added difficulties they would experience in the event of an erroneous decision to terminate benefits. It selected as case examples, however, persons whose benefits had been terminated without notice and without any opportunity for review under prior procedures superseded by the adoption of the regulation now challenged. Although the District Court sustained Section 351.26(a), as interpreted, it nevertheless struck down Section 351.26(b) as unconstitutional. Its conclusion seems to be based largely on prior terminations ef-

fective before any review procedures were in effect. The District Court did not measure Section 351.26(b) against the results obtained under its prior review procedures, but found it unconstitutional on its face as deficient in due process in light of the experience of beneficiaries who had no prior review at all.

This conclusion was not warranted under the circumstances. Section 351.26(b) can be made to work fairly, particularly when implemented under the carefully drawn provisions of New York City Procedure No. 68-18 (147a-149a). There was no basis on which the District Court could predict that this newly adopted regulation would fail to protect welfare recipients and provide them in practice with at least the minimum requirements of due process of law. The regulation did not become effective until May 27, 1968, in New York City. This case was argued below on June 26, 1968.

Appellees claimed that, even in the few weeks between the effective date of the regulation in New York City and the hearing before the three-judge Court, the regulation was not being implemented to their satisfaction. It was asserted that some of the notices were inadequate and, in effect, that errors might still occur. Under any new procedures affecting thousands of persons it is likely that errors may occur. They need not be fatal. They need not go uncorrected. Appellant was determined to implement the new regulation in a manner sympathetic and responsive to the rights of welfare beneficiaries and consistent with his duty to avoid waste of public funds. Section 351.26(b), as implemented by Procedure No. 68-18, affords adequate protection for appellees' rights and its use should not have been enjoined.

Since the Court below heard this case shortly after the implementation of the new procedure, the statistical record of performance under it is limited. However, the affidavit

of appellant Goldberg (320a-321a), submitted after argument, showing the experience of the Department of Social Services for the period May 27, 1968 to July 1, 1968, includes the following data:

Number of Notices of Intent to Suspend or Discontinue Assistance	1094
Number of requests for review	145
Time Lapse between date of request for review and the date of the decision	
one day	33
two days	23
three days	13
four days	14
five days	16
six days	5
More than six days	20
Number Sustained	69
Number Reversed	55
Pending	21

These figures alone should have led the Court below to deny the preliminary injunction sought by plaintiffs. The percentage of reversals exceeded the average percentage of reversals after a Fair Hearing on cases discontinued before the new procedures were adopted.

The Court below noted (376a, n. 17) that only about 64% of cases involving discontinuance of welfare benefits were affirmed after Fair Hearings during the period April through August, 1968 but later figures for September and October, 1968 showed a higher percentage.

Since the procedure attacked here was implemented in New York City on May 27, 1968, the earliest gauge of how the system stood up on review in Fair Hearings would

begin with the figures for July, 1968. The record sets forth these figures for July through October, 1968 on a statewide basis as follows (358a-362a):

	July	*August*	*September*	*October*
Affirmed	17	15	7	26
Reversed	3	3	0	3
Reversed in part	0	0	0	0
Remand	0	1	0	2
Misc.	0	3	1	2
Totals	20	22	8	33

Assuming that every reversal occurred in a case originating in New York City—and this is not clear from the record—then 9 out of 65 cases or 13.8% were reversed. This is a substantial improvement over the prior record when cases of discontinuances went to the fair hearing stage without the pretermination procedures under § 351.26(b), as implemented in New York City under its local procedure No. 68-18. It should also be noted that many of the decisions reached during the months of July through October, 1968 related to cases brought prior to May 27, 1968, the beginning of pretermination proceedings under Procedure No. 68-18 in New York City. In short, the introduction of the new system led to a sharp increase in affirmances of decisions to discontinue benefits after review by a Fair Hearing.

Despite this record which was still improving, the Court below found the new procedures defective as a denial of due process. Experience over a longer period, during which the after effects of the old system would have dissipated, might well have demonstrated on the basis of statistical data that the new system was constitutionally adequate. The District Court, however, after discussing case histories of welfare recipients whose benefits were terminated prior to the implementation of § 351.26(b),

concluded that the damage that might flow from an erroneous determination was so substantial that further procedural safeguards were required as a matter of constitutional right (372a-377a).

Essentially the District Court found § 351.26(b) defective in two respects: (1) lack of sufficient disclosure to the client of the reasons and evidence in support of termination; and (2) lack of an opportunity for a personal appearance and confrontation of adverse witnesses before the review officer. There is nothing, however, that would prevent a court from reading a requirement of adequate disclosure into the notice which is provided (see form 3c annexed to procedure No. 68-18 following p. 148a). There was no intent to be mysterious on the part of appellant. More detail as to the basis of the proposed termination could be supplied where required.

The Court below evidently overlooked or gave no weight to the requirement in Procedure No. 68-18 that the caseworker prior to sending out a notice of intent to suspend benefits must have a discussion and make a record of a discussion with the client as to "the reasons for the proposed suspension or discontinuance of assistance" (Procedure No. 68-18, p. 2, following p. 148a). A personal conference is a part of the procedure under attack and can be used by the client as an opportunity to get whatever information is needed to understand the reasons for the proposed termination. More formal procedures are available at the Fair Hearing stage should an adverse decision be reached under § 351.26(b).

In sum, the system adopted by New York City in practice could have worked and in fact was working to protect the rights of welfare beneficiaries and the taxpayers who have the right to expect that persons who are not qualified to receive benefits will be terminated with some degree of promptness consistent with due process. On the record presented here it was error to strike down the procedure in

effect in New York City as constitutionally defective on its face.

(4)

In *Wheeler* v. *Montgomery, et al.*, questions very similar to those presented here were raised before a three-judge court. The California procedure, among other things, called for a conference between the client and "his case-worker, an eligibility worker, or another responsible person in the county department" to discuss the question of termination of assistance. Notice of the meeting was to be sent not later than three days prior to the next date a client might expect to receive a payment. The plaintiffs objected to the procedure on five grounds:

> "(1) the conference is with a county official of the agency which has already determined the question of eligibility rather than before an 'impartial' referee;
>
> (2) the three day notice requirement is too short;
>
> (3) no transcript is required to be made or furnished and the decision is not specifically required to be made only on the evidence present at the conference;
>
> (4) the burden of proof is on the recipient to establish eligibility and not on the county to establish ineligibility, and (5) confrontation and cross-examination are not required."

In sustaining the California procedure the court stated:

> "The constitutionality of the 'informal conference' must be determined in light of the fact that even if aid is terminated, the State of California must provide the recipient with the kind of hearing plaintiff seeks. At present such 'fair hearing' is required to be given within 45 days and a decision rendered within the next 75 days. As of July 1, 1968, the hearing and decision will be required to be made within 60 days."

A comparison of the New York provisions on termination with those sustained in *Wheeler* indicates that the New York provisions offer a more adequate opportunity for a meaningful review of the client's status prior to termination than the provisions approved in *Wheeler*.

Even if this were not true, it does not follow that the New York procedure is unconstitutional. Uniformity among the states is not required although all must meet the same minimal standards.

In New York a person on public assistance must get at least seven days notice prior to termination. If the client requests a review of the proposed discontinuance, assistance will continue until the review officer makes his determination. If the review officer commits error, assistance payments will be restored in full retroactively after a Fair Hearing (322a-323a). By comparison, a civil service employee can be suspended without pay for 30 days by immediate action of his department head who intends to prefer charges against him under Section 75 of the New York Civil Service Law. Similarly, teachers may be suspended without pay for 90 days pending disposition of charges (New York Education Law, § 2573[7]). In both instances, if the charges are dismissed, the employee is entitled to reinstatement with full back pay. The reasons for these statutes have application here. Public money should not be paid out to persons who are not entitled to receive it.

Appellant does not claim that thousands of cases can be processed without error. Where error occurs however, it does not necessarily follow that the procedures are constitutionally defective, especially where both Fair Hearing procedures and judicial review are available to correct administrative mistakes. The present procedures strike a reasonable balance between the needs and rights of the welfare client and the need to protect the public's tax revenues. The policy at the federal, state and local level is clear: assistance must be provided for those who qualify

but all reasonable efforts must be made to terminate promptly but fairly payments to all those who become ineligible. The procedures adopted in New York City for termination of public assistance should have been sustained.

CONCLUSION

The decision below should be reversed. The injunction should be vacated. Appellant's motion for a summary judgment should be granted, and the complaints should be dismissed.

June 27, 1969.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

—against—

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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INDEX

PAGE

Opinion Below xix

Jurisdiction xix

Constitutional Provision and Regulation Involved xx

Questions Presented 1

Statement of the Case 1

Summary of Argument 8

I. Due process requires a hearing on the revocation of public assistance benefits 12

A. Appellant's Asserted Distinction Between the Procedure Required for the Protection of "Private Rights" and Other Unspecified Legal Interests Is Inadequate for Determination of the Requirements of Procedural Due Process of Law 12

B. Home Relief and AFDC Are Statutory Entitlements Afforded as of Right to All Eligible Individuals 19

C. The Entitlement to Home Relief and AFDC Is Afforded Only to Destitute Persons and Families Without Resources, Income and Alternative Sources of Support Who Are Starkly Reliant on the Bi-Weekly Subsistence Grant 25

PAGE

D. The Erroneous Revocation of Entitlement and Withdrawal of Aid Works Immediate and Irremediable Harms Jeopardizing Critical Aspects of Individual and Family Life and Liberty 27

E. The Complexity of the Factual and Evaluative Issues Involved, the Characteristics of the Decision Makers, and the Consequently High Probability of Administrative Error Render an Adequate Hearing Peculiarly and Extraordinarily Necessary 29

F. The Interest of the State: The Nature of the Governmental Power Exercised Does Not Justify the Abrogation of Traditional Requirements of Due Process 39

II. Due process requires the rudiments of an opportunity to be heard on a contested decision to terminate assistance 43

III. Due process requires that individuals previously found eligible for statutory subsistence grants be given an opportunity to be heard before those grants are terminated 51

IV. The H. E. W. tentative regulation requiring continuation of aid in some circumstances during the state hearing process is not an alternative basis for affirmance in this case .. 62

PAGE

A. The H. E. W. Regulation Does Not Afford Adequate or Effective Protections to Recipients in the Federal Programs .. 63

B. The H. E. W. Regulation Does Not Afford Any Protection to the Appellees Receiving Benefits Under New York's Home Relief Program 69

V. The plea for administrative flexibility is both untimely and irrelevant to constitutional resolution of the due process rights of welfare recipients 71

CONCLUSION 73

APPENDIX A:

Statements of Fact for Individual Plaintiffs 75

APPENDIX B:

Administrative Letter 92

APPENDIX C:

Codes Used in Closing and Reclassifying Cases 96

Table of Authorities

PAGE

Case Materials

Anders v. California, 386 U. S. 738 (1967) 57
Armstrong v. Manzo, 380 U. S. 545 (1965) 43, 59

Bailey v. Engleman, Civ. Act. No. 654-69 (D. N. J.) 58
Bailey v. Richardson, 182 F. 2d 46 (D. C. Cir. 1950), *aff'd per curiam* 341 U. S. 918 (1951) 15
Bi-Metallic Co. v. Colorado, 239 U. S. 441 (1915) 40
Board of Social Welfare v. Los Angeles County, 27 Cal. 2d 81, 162 P. 2d 630 (1945) 24
Bowles v. Willingham, 321 U. S. 503 (1944) 53
Bradley v. Ginsberg, 67 Civ. 3047 (S. D. N. Y. 1967) 42
Bratton v. Chandler, 260 U. S. 110 (1922) 14
Brinkerhoff-Farrish Trust & Savings Co. v. Hill, 281 U. S. 673 (1929) 59

Cafeteria and Restaurant Workers Union v. McElroy, 367 U. S. 886 (1961) 14, 15, 18, 39, 41
Caldwell v. Laupheimer, Civ. Action No. 69-392 (E. D. Pa. 1969) 60
City of Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931 (1889) 19
Cole v. Young, 351 U. S. 536 (1956) 41
Conant v. State, 197 Wash. 21 (1938) 24
Covey v. Summer, 351 U. S. 141 (1955) 59

Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969) 24, 42
Dixon v. Alabama State Board of Education, 294 F. 2d 150, *cert. denied*, 368 U. S. 930 (1961) 17
Doe v. Shapiro, —— F. Supp. ——, Civ. No. 13,093 (D. Conn. August, 1969) 24, 25, 42

PAGE

Douglas v. California, 372 U. S. 353 (1963) 13
Draper v. Washington, 372 U. S. 487 (1963) 57

Ewing v. Mytinger & Casselberry, Inc., 339 U. S. 594 (1950) 53

Fahey v. Mallone, 332 U. S. 245 (1947) 53
Flemming v. Nestor, 363 U. S. 603 (1960) 13
FPC v. Texaco, 377 U. S. 33 (1964) 66
FPC v. Tennessee Gas Transmission Co., 371 U. S. 145 (1962) 53

Gilbert v. California, 388 U. S. 263 (1967) 72
Galvan v. Press, 347 U. S. 522 (1954) 14
Goldsmith v. Board of Tax Appeals, 270 U. S. 117 (1926) 14, 41
Gonzalez v. Freeman, 334 F. 2d 570 (D. C. Cir. 1964) .. 16
Greene v. McElroy, 360 U. S. 474 (1959) 15, 41, 43, 44, 45, 62

Halsey, Stuart & Co. v. Public Service Comm., 212 Wis. 184, 248 N. W. 458 (1933) 53
Hamilton v. Regents of the University of California, 293 U. S. 245 (1934) 12
Hannah v. Larche, 363 U. S. 410 (1960) 18, 41, 44
Harmon v. Forssenius, 380 U. S. 528 (1965) 56
Holmes v. New York City Housing Authority, 398 F. 2d 262 (2d Cir. 1968) 21
Holt v. Richmond Redevelopment and Housing Auth., 266 F. Supp. 397 (E. D. Va. 1966) 17
Homer v. Hickel, Civ. No. 69-83 Tucson (D. Ariz. May 14, 1969) 58

PAGE

Homer v. Richmond, 292 F. 2d 719 (D. C. Cir. 1961) ... 17
Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964) 17, 43
Hunt v. Bonilla, —— M. 2d ——, —— N. Y. S. 2d —— (N. Y. L. J., April 8, 1968) 24
Hyser v. Reed, 318 F. 2d 225 (D. C. Cir. 1963) 43

I. C. C. v. Louisville & Nashville R.R., 227 U. S. 88 (1913) 42
In re Carter, 192 F. 2d 15 (D. C. Cir. 1951), *cert. denied*, 352 U. S. 862 (1951) 17
In re Gault, 387 U. S. 1 (1967) 43

James v. Goldberg, 69 Civ. 2448 (S. D. N. Y. June 1969) 42
Jay v. Boyd, 351 U. S. 345 (1956) 16, 45
Jefferson v. Hackney, —— F. Supp. —— (N. D. Tex. Civ. No. 3-3012-B–3-3126-B, 1969) 42
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951) 16, 41, 43

Kent v. U. S., 383 U. S. 541 (1966) 43
King v. Smith, 392 U. S. 309 (1968) 13, 20, 21, 23, 40, 42, 64, 65
Knauff v. Shaughnessy, 338 U. S. 537 (1950) 15
Kwong Hai Chew v. Colding, 344 U. S. 590 (1953) ... 41

Lampton v. Bonin, —— F. Supp. —— (E. D. La. Civ. No. 68-2092-E, 1969) 39
Lane v. Brown, 372 U. S. 477 (1963) 57
Levy v. Louisiana, 391 U. S. 618 (1967) 13
Londoner v. Denver, 210 U. S. 373 (1908) 40, 46, 52, 69
Ludecker v. Watkins, 335 U. S. 160 (1948) 15

PAGE

Machado v. Hackney, —— F. Supp. —— (Civ. Act. No. 68-108-SA, W. D. Tex. May 12, 1969) 58, 60
Madera v. Bd. of Educ. of New York City, 386 F. 2d 778 (2d Cir., 1967) 17
Mapp v. Ohio, 367 U. S. 643 (1961) 72
McAuliffe v. Mayor of New Bedford, 155 Mass. 216 (1893) 12
McCullough v. Terzian, No. 379011 (Super. Ct., Alameda County, May 12, 1968) 58
Minkoff v. Payne, 210 F. 2d 689 (D. C. Cir. 1953) 17
Miranda v. Arizona, 384 U. S. 436 (1966) 72
Morgan v. United States, 298 U. S. 468 (1936) 67, 68
Morgan v. United States, 304 U. S. 1 (1938) 52
Mullane v. Central Hanover Trust Co., 339 U. S. 306 (1944) 59

Nickey v. Mississippi, 292 U. S. 393 (1934) 52
Ng Fung Ho v. White, 259 U. S. 276 (1922) 14, 29
Norwegian Nitrogen Products v. United States, 288 U. S. 294 (1933) 25

Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994 (D. C. Cir. 1966) 43
Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U. S. 292 (1937) 18, 42
Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 (1923) 54
Opp Cotton Mills v. Administrator, 312 U. S. 126 (1941) 52

Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955) 17
Pennsylvania v. West Virginia, 262 U. S. 553 (1923) 52
Phillips v. Commissioner, 283 U. S. 589 (1931) 53, 54

PAGE

Reilly v. Pinous, 338 U. S. 269 (1949) 43
Rios v. Hackey, 294 F. Supp. 885 (N. D. Tex. 1967) 42, 45
Rosado v. Wyman, —— F. Supp. ——, 69 Civ. 355 (E. D. N. Y. 1969), rev. other grounds, —— F. 2d —— (2d Cir. 1969) 26
Rothstein v. Wyman, —— F. Supp. ——, 69 Civ. 2763 (S. D. N. Y., August 4, 1969) 24

Schecter Poultry Co. v. United States, 295 U. S. 495 (1935) 19
Schware v. Board of Bar Examiners, 353 U. S. 232 (1957) 15
Shapiro v. Thompson, 394 U. S. 618 (1969) 13, 19, 24, 40, 57
Sherbert v. Verner, 374 U. S. 398 (1963) 13
Shields v. Utah-Idaho Central Ry. Co., 305 U. S. 177 (1938) 63
Simmons v. United States, 348 U. S. 397 (1955) 43
Slochower v. Board of Higher Education, 350 U. S. 551 (1956) 13, 15
Smith v. Alright, 321 U. S. 649 (1944) 56
Smith v. King, 277 F. Supp. 31 (M. D. Ala. 1967) 23
Snaidach v. Family Finance Corp., 395 U. S. 337 ....43, 51, 52, 53
Snell v. Wyman, 281 F. Supp. 853 (S. D. N. Y., 1968), aff'd 393 U. S. 323 (1969) 55
Solmon v. Shapiro, —— F. Supp. —— (Civ. No. 12,790, D. Conn. April, 1969) 24, 42
Southern Ry. Co. v. Virginia, 290 U. S. 190 (1933) 44
Speiser v. Randall, 357 U. S. 513 (1958) 13

PAGE

The Japanese Immigrant Case, 189 U. S. 86 (1903) 14
Thomas v. Housing Authority of Little Rock, 282 F. Supp. 575 (E. D. Ark. 1967) 21
Thorpe v. Housing Authority of Durham, 393 U. S. 268 (1969) 17, 62
Traux v. Raich, 239 U. S. 33 (1915) 13
Turner v. Barbaro, —— M. 2d ——, —— N. Y. S. 2d —— (Sup. Ct., Nassau County, 1968) 46

United States v. McCrillis, 200 F. 2d 884 (1st Cir. 1952) 69
U. S. v. Illinois Central Railway Co., 291 U. S. 457 (1934) 52
U. S. v. Wade, 388 U. S. 218 (1967) 72

Wasson v. Trowbridge, 382 F. 2d 807 (1967) 17
Westberry v. Fisher, 297 F. Supp. 1109 (D. C. Me., 1969) 13
Western Union Tel. Co. v. Kansas, 216 U. S. 1 (1910) .. 56
Wieman v. Updegraff, 344 U. S. 183 (1952) 13
Wilkie v. O'Connor, 261 App. Div. 373 (N. Y. 1941) 19
Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968) 21, 24, 42
Williams v. Oklahoma City, —— U. S. ——, 89 S. Ct. 1818 (1969) 57
Willner v. Committee on Character and Fitness, 373 U. S. 96 (1963) 15, 41, 43, 44, 45
Wilson v. Standefer, 184 U. S. 399 (1902) 52
Wolfe v. Colorado, 338 U. S. 25 (1949) 72
Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) 14, 43, 67

PAGE

Yakus v. U. S., 321 U. S. 414 (1944) 53, 54, 69
Yick Wo v. Hopkins, 118 U. S. 356 (1886) 42, 50

Zemel v. Rusk, 381 U. S. 1 (1965) 13

CONSTITUTIONAL MATERIALS

United States Constitution:

Fourteenth Amendment i

STATUTORY PROVISIONS

United States Code:

28 U. S. C. §1253 1
28 U. S. C. §1343 1
42 U. S. C. §601 ..... 1, 40
42 U. S. C. §602(a)(3) 20
42 U. S. C. §602(a)(4) 2, 20, 63
42 U. S. C. §602(a)(9) 20
42 U. S. C. §602(a)(10) 20, 21
42 U. S. C. §602(a)(19) 26, 35
42 U. S. C. §603 20
42 U. S. C. §604 63
42 U. S. C. §606 ..... 20, 25
42 U. S. C. §1118 55
42 U. S. C. §§1396 *et seq.* 28
42 U. S. C. §§1401 *et seq.* 21
42 U. S. C. §1705 55
42 U. S. C. §1983 1
42 U. S. C. §§2571 *et seq.* 21
42 U. S. C. §2809(a)(c)(i) 21

PAGE

New York Laws:

52 N. Y. §§1 *et seq.* 30
52 N. Y. §104 55
52 N. Y. §131(4) 26
52 N. Y. §145 ..... 31, 59
52 N. Y. §157 2
52 N. Y. §158 30
52 N. Y. §302 30
52 N. Y. §344(3) 30
52 N. Y. §349 30
52 N. Y. §353 66

RULES & REGULATIONS

Code of Federal Regulations:

45 C. F. R. §205.10 62
45 C. F. R. §205.20 22

Federal Register:

33 Fed. Reg. §17189 (Nov. 20, 1968) 65

Department of Health, Education & Welfare Federal Handbook of Public Assistance Administration:

Part IV §2200(a) 22
§2200(b)(1-4) 22, 29
§2230 29
§2300 49
§2321 22
§3120 25

PAGE

Codes, Rules & Regulations of the State of New York:

18 NYCRR §82 ..... 2, 31
18 NYCRR §98.7 48
18 NYCRR §351.1 30
18 NYCRR §351.2 30
18 NYCRR §§351.6, 7, 8, 9, 10 30
18 NYCRR §351.22 ..... 30, 31, 66
18 NYCRR §351.23 49
18 NYCRR §351.24 30
18 NYCRR §351.26 ..... 5, 57, 69, 70
18 NYCRR §352.8 27
18 NYCRR §356.4 66
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PAGE

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PAGE

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Abbott, G., From Relief to Social Security (1968) 19

Administrative Letter No. 69 PWD-14 (February 14, 1969) 65

Altmeyer, The Formative Years of Social Security (1968) 64

Bell, Aid to Dependent Children (1965) 19

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Bureau of Social Service Research, *The Ineligibles: A Study of Fifty Families Terminated or Ineligible for Public Assistance* (1963) 38

PAGE

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Circular Letter No. 609, March 3, 1969, Irving J. Engleman, Director, New Jersey Division of Public Welfare 65

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In the Matter of: The Petition of the State of Georgia for Reconsideration of Its Proposed Implementation of Section 208(b) of P. L. 90-248 Before the Administrator, Social and Rehabilitation Service, Department of Health, Education and Welfare 20

Interrogatories V, *Lampton* v. *Bonin* (Civil Action No. 68-2092 E. D. La. 1969) 39

PAGE

Interrogatories dated May 13, 1969, *Caldwell* v. *Laupheimer* (Civil Action No. 69-392 E. D. Pa. 1969) 60

Keith-Lucas, Decisions About People in Need (1957) 35, 36, 37, 46

Letter from Robert H. Finch to Richard Flaster (May 6, 1969) 64

Massachusetts Manual 57

Memorandum from Fred Stuninger, Director, H. E. W. Bureau of Family Service, to Ellen Winston, Commissioner of Welfare, H. E. W. 35

Michigan State Dept. of Social Services, Time Intervals Between Date Hearing Requested Received in State Office and Date of Final Action (1969) 39

Mississippi Manual 57

Motion of State of Texas to Stay Enforcement; Mackado v. Hackney (Civil Action No. 68-108, S. A. W. D. Tex. May 12, 1969) .. 60

N. Y. Times 37

N. Y. C. Dept. of Social Services, Review Section Reports Quarter Ending March 31, 1969, Months Ending April 30, 1969 and May 31, 1969 ..... 54, 57

Policies Governing Public Assistance 36

PAGE

Report of the National Advisory Commission on Civil Disorders (1967) 58

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Willcox, A., Memorandum Concerning Authority of the Secretary Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on Ground of Its Limitations on Eligibility, March 25, 1963 .. 23

Yahr and Pomeroy, Studies in Public Welfare: Effects of Eligibility Investigation on Welfare Clients (1968) 59

In the

Supreme Court of the United States

October Term, 1969

No. 62

Jack R. Goldberg, Commissioner of Social Services of the City of New York,

Appellant,

—against—

John Kelly, Ruby Sheafe, Teresa Negron, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Opinion Below

The opinion of the District Court is reported at 294 F. Supp. 893 (S. D. N. Y. 1968). It is set out in the joint appendix at pp. 365a-392a.

Jurisdiction

The decision of the three-judge district court granting appellees' motion for a preliminary injunction and denying appellant's motion for a summary judgment was entered on November 26, 1968. The order appealed from was issued on December 13, 1968. Appellant's notice of appeal

was filed on January 6, 1969. A jurisdictional statement was filed on March 6, 1969, and probable jurisdiction was noted on April 21, 1969. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 which provides for direct appeals from decisions of three-judge district courts.

Constitutional Provision and Regulation Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that

> No State . . . shall . . . deprive any person of life, liberty or property without due process of law.

Title 18 N. Y. C. R. R., Section 351.26 provides as follows:

> 351.26 Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:
>
> (a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to; the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not

be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social

services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any, of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an insti-

tution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate writen notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

Questions Presented

Appellees were found after investigation to be without sufficient income, resources or sources of support to meet minimal daily needs and to be otherwise eligible for public assistance, a statutory entitlement. Thereupon they received a bi-weekly subsistence grant for shelter, food, clothing, and other necessities. Later, a caseworker-investigator undertook to make an administrative finding that Appellees were no longer eligible and forthwith to terminate the subsistence grant.

1. In these circumstances, does due process of law allow abrupt *ex parte* termination of assistance without an opportunity to learn of and contest the reason for termination?

2. Does an opportunity to write a letter in opposition to the caseworker-investigator's confidential report being reviewed constitute a Constitutional opportunity to be heard?

Statement of the Case

This class action, commenced in January, 1968, pursuant to the Civil Rights Act, 42 U. S. C. §1983 and 28 U. S. C. §1343, challenges New York State regulations and administrative policies authorizing the abrupt *ex parte* termination of public assistance grants upon which plaintiffs and all others similarly situated depend for the basic essentials of life. The plaintiffs, recipients of aid under the federally-established Aid to Families with Dependent Children Program, 42 U. S. C. §601 *et seq.*, or under the State Home

Relief Program, New York Social Services Law §157 *et seq.*, were all terminated or threatened with termination without an opportunity for an adjudicatory hearing prior to the contested revocation of entitlement and termination of aid.

The twenty named plaintiffs had received public assistance grants for periods ranging from several months to several years.[1] All had been found entitled to receive this aid after an extensive investigation and verification revealing that they were without sufficient income and resources to meet minimal current needs and that they otherwise satisfied the conditions for receipt of a subsistence grant, including the relinquishment of all resources unrelated to daily needs. App. A.

During the time that Appellees were receiving aid, a caseworker periodically investigated continuing eligibility through personal interviews with Appellees in their homes (70a, 185a), interviews with collateral sources, such as neighbors, relatives (18a), landlords and employers (79a), 18 NYCRR §82.1, and investigation of unsolicited information furnished by other persons (186a). The caseworker regularly consulted with supervisors on matters of eligibility (257a, 277a) and entered written reports of the investigations and consultations in the confidential "case record" maintained for each recipient (200a).[2]

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[1] The individual situations are set out more fully in Appendix A to this Brief (hereinafter App. A). References to the joint appendix in this Court are designated "—a", and references to appellant's Brief in this Court are designated "Br.—".

[2] In the New York City Department of Social Services, determination of eligibility is made by a case unit comprised of caseworkers, unit supervisors, and a case supervisor.

In lieu of the recurring bi-weekly check upon which each family was dependent for rent, food, and other essentials, the Appellees received a notice of termination,[3] setting forth the department's official category for case closings [e.g., refused to permit collateral visits (70a, 76a), refused to cooperate or comply (19a)] and, at times, a cryptic reference to the applicability of the official category to the individual situation (19a, 70a). Subsequent exploration showed that the revocations had been based upon sundry reports (186a, 228a), statements of collateral sources (79a), rumors, misinterpretation of department policies and, most frequently, misunderstandings or disagreements between caseworker and recipient (185a, 195a). It also showed that the caseworker's actual reason for termination often bore no relation to the summary message contained in the notice (38a, 70a, 186a, 298a).

Unlike most indigent recipients of assistance, all the plaintiffs had the assistance of attorneys or lay advocates to challenge their terminations. Some of the plaintiffs sought to contest the finding of ineligibility in the "fair hearing" before the State Agency required for AFDC by 42 U. S. C. §602(a)(4),[4] and recently extended by regula-

[3] In some instances, there was neither payment nor notice of termination (14a, 171a, 190a). Certain other plaintiff-intervenors received a Notice of Intent to Terminate pursuant to New York City's newly-adopted prior review procedure (220a, 222a).

[4] This hearing is held before a state referee; a verbatim transcript is made; and a written decision based on the transcript is rendered by hearing officials in Albany. This hearing systematically entails, then and now, at least several months from request to determination, during which time aid is not continued.

During the course of the lawsuit, New York altered its regulations to provide for retroactive payments after reversal of an erroneous termination in a subsequent statutory hearing. Since the recurring grant is supplemented by grants for special needs and

tion to Home Relief (179a, 186a, 792a). These hearings were held and determined many months after the actual termination of assistance (174-175a, 216a, 298a, 363a, 392a).[5] Other plaintiffs sought immediately to reapply, but the contested finding of ineligibility barred any new application until reversed in the subsequent hearing process (72a, 176a, 187a). Others sought to utilize the review procedure formulated during the course of this lawsuit, but encountered the difficulties entailed in that procedure (189a, 196a, 198a, 200a). Despite pertinacious informal efforts to elicit the necessary information, the Appellees were frequently unable to ascertain one unchanging basis for revocation (169a, 188a, 200a). After months of delay and severe deprivation, the revocation of aid was found erroneous in regard to most of the named plaintiffs (298a, 363a, App. A).

Upon abrupt withdrawal of aid, however, the immediate and overwhelming problem the Appellees confronted was not legal wrangling with the welfare department. It was to survive willy nilly from day to day without subsistence income; to obtain sleeping quarters and daily food for themselves and their children by dint of will and catch as catch can. Thus, plaintiffs sought to obtain emergency food from the Department or from friends, their attorneys, and

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the provision of social services, available only to currently eligible recipients, the amount awarded retroactively is not equal to the amount to which the recipient would have been entitled had aid been continued.

[5] Under the instructions of the district court, hearings were provided to some of the individual plaintiffs on an expedited basis; even with expedition, the state hearing process did not officially reverse the erroneous terminations or restore aid to the plaintiffs until three to six months after cut-off.

other private sources (15a, 21a); to forestall evictions or to find free shelter (187a); to combat illness or obtain free medical assistance (72a). These efforts were often not successful, although injury to some of the named plaintiffs was minimized by applications for temporary relief in this lawsuit.[6]

Immediately after the assertion of the due process claim in this action, the defendant State Administrator agreed to provide by regulation a hearing prior to termination.[7] In recognition of the persistent systematic delay in the state-administered hearing system, the State Defendant required that the local departments institute another hearing mechanism to provide an expedited informal hearing before a local review officer. 18 NYCRR §351.26, added eff. March 1, 1968. Under this procedure (hereinafter referred to as Option a), the former Notice of Termination, with the conclusory statement of the reason, became a Notice of Proposed Termination after seven days from mailing, within which time an aggrieved recipient could request a review and appearance, with counsel, before a local official superior to the person approving the tentative decision to terminate. Rights of apprisal, confrontation, cross examination and a decision on the hearing record were not spelled out in the regulation. Aid was to be continued

[6] Plaintiffs Esther Lett and Ruby Sheafe were provided an emergency grant or restored to aid *pendente lite* in response to the several requests of the District Court in in-chambers conferences. The hearings of others were expedited pursuant to similar requests.

[7] The statutory hearing before the State Administrator, long required in the federal AFDC program, was extended by regulation to recipients of Home Relief two weeks before the filing of this action in January 1968. Numerous other federal and state administrative vicissitudes in response to the due process claim herein are set forth in the opinion of the court below (366a-371a).

during the one to two week period contemplated for such review, and, the state hearing process, after termination of aid, remained available to persons still aggrieved.

The City Department, however, refused to accede to Option a, and, after lengthy negotiations with the State, prevailed upon it to accept an alternative procedure formulated by the City's Office of Corporation Counsel (125a, 147a). This alternative, 18 NYCRR §351.26(b), which became a state-wide option to the original regulation (hereinafter referred to as "Option b,") provides for the same seven-day notice as above, allows the recipient to request her own case supervisor to review the confidential case record, and permits the recipient to submit "in writing a statement or other evidence to demonstrate why aid should not be discontinued." Some of the intervening plaintiffs were terminated under this procedure and it remained in force in New York City from May 1968 through December 1968, when it was enjoined by the three-judge district court, Circuit Judge Feinberg and District Judges Bryan and McLean.

Notwithstanding the somewhat intricate administrative responses tendered to the district court, the issue remained as it was at the outset: whether due process of law required *one* Constitutionally-adequate opportunity to be heard *before* a contested revocation of eligibility and sudden withdrawal of aid. The court unanimously found that under all the circumstances, the Constitution requires "an adequate hearing before termination, and the fact that there is a later Constitutionally-fair proceeding does not alter that result" (377a). The circumstances included "the brutal need of families and individuals . . . in this unique situation not to be wrongfully deprived of assistance,"

(374a, 376a), "the shattering effect of wrongful termination upon a recipient," (385a) and "the obvious fact . . . that there is no way truly to make whole a recipient" whose aid is erroneously withdrawn (376a). The additional costs of continued aid during the several week period for review —the only countervailing governmental interest asserted— was well within "the power of the State and City to minimize . . . by various methods" (375a). Focusing on the adequacy of the pre-termination procedures, the Court found Option b invalid because it denied the rudiments of a right to be heard: the right to learn of the charge and the evidence on which it is based, an opportunity to rebut this evidence by putting questions to its source and by producing evidence in one's own behalf; and the right to a determination by a relatively disinterested official on the evidence introduced before him, absent a demonstrable agency interest in secrecy (380a-386a). Option a was construed to provide these essentials, and as such was deemed to be valid (386a-390a). Pursuant to the preliminary injunction, Option a of the Regulation is now in force throughout the State.

Initially, it is well to express what is not involved in this case. Appellees raise no issue of the procedural protections which must be afforded to individuals making initial application for public assistance; nor do they raise questions of the procedures required where the administrative determination is to adjust rather than to terminate benefits. Those problems are distinguishable. Further, Appellees agree with the finding of Judge Feinberg that due process does not require "that every person directly affected by administrative action must be afforded all of the procedural rights guaranteed in a full-fledged trial" (380a).

Finally, Appellees also agree that one appropriate and timely hearing on a contested decision to terminate, whether conducted by the State or City, satisfies constitutional standards of due process. The duplication entailed in both a local and state hearing results not from the requirements of due process as applied below, but rather from the voluntary preference of the state in both this case and in *Wheeler* v. *Montgomery*, for expedited local review.[8]

Summary of Argument

I.

When the state acts to cause grievous injury through the revocation of statutory rights, entitlements or even governmental privileges, the Due Process Clause of the Fourteenth Amendment requires that minimal procedural safeguards be afforded. Recipients of subsistence grants for the bare necessities of life have a constitutional right to procedures permitting a proper determination of the legal and factual predicates on which governmental action affecting their critical interest is premised.

Public assistance benefits are no longer distributed as an act of charity at the whim of an administrator. Rather,

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[8] The New York State agency chose to require its local departments to afford a hearing before termination, rather than requiring that aid be continued pending the "fair hearing" mandated by federal statute in AFDC. Either alternative would satisfy Appellees' due process claim. The decision to require two hearings was New York State's. Accordingly, the court below did not order dual hearings in either Home Relief or AFDC. It merely required that there be *a* hearing before termination in accordance with *minimal* requirements of due process. Since duplication is the State's preference, the City agency's objections should be directed to the State, not to the due process clause. Duplication is not a consideration in this case or in *Wheeler* v. *Montgomery*.

under the applicable state and federal legislation, these grants are statutory entitlements, afforded as a matter of legal right to all persons sufficiently disadvantaged to fall within the category singled out for aid and who lack the resources and income deemed necessary for survival. An individual is found eligible for this statutory entitlement only upon extensive investigation and documentation showing that he has exhausted all assets, is without another source of support and has relinquished all resources unrelated to daily needs to the welfare department. The nature of the statutory entitlement and specific provisions require that an administrative decision to terminate assistance be based on an administrative finding that the individual no longer meets one of the prescribed conditions of eligibility. Administrative action terminating the assistance grant is plainly adjudicatory, entailing both particularistic findings about an individual and the binding application of rules and regulations to such findings. When the caseworker-investigator misunderstands the facts or misapplies the law and aid is erroneously withdrawn, the resulting harms are wholesale and immediate: families are evicted from their homes, children go hungry.

In these circumstances the minimal elements of Due Process include the individual's right to know the case against him, to be heard and to present evidence in his behalf, to confront and question adverse witnesses and to challenge the applicability of a rule or policy to his case.

II.

Final, *ex parte*, government action inflicting immediate harm on the individual is not made constitutional by later affording the individual an opportunity to learn and con-

test the charges against him. This is particularly so where the injury is immediate and irreparable, the likelihood of administrative error great, the subsequent review is afforded long after the harms are inflicted, and there is no public necessity for summary, *ex parte* action.

III.

The documentary review prior to termination tendered by the Appellant is not constitutionally adequate. It does not assure that the individual will be informed of the case against him and does not afford the individual an opportunity to contest the charges against him. The document upon which review is primarily based is the record containing the caseworker's *ex parte* version of conversations with the recipient and other collateral sources. This record may be supplemented only by whatever written documents and written evidence the indigent recipient, without knowing the charges or evidence against him, may prepare and submit within a few days. A pre-termination discussion between the caseworker who has made and announced a tentative decision to terminate benefits and the recipient does not ameliorate the constitutional inadequacy of this documentary review. The investigator's home visits, threats and interrogations are not new to welfare; they do not constitute either notice of the charges or an opportunity to be heard but rather simply underscore the critical need for meaningful prior review.

IV.

The proposed regulation of Department of Health, Education and Welfare providing for the restoration of aid pending the determination of a statutory fair hearing in cases raising "an issue of fact or of judgment" is not an acceptable alternative to constitutional resolution of the issue here presented. It affords no relief for the recipients of statutory aid under New York's Home Relief Program. The procedural protection which it offers recipients of federal categorical aid is itself Constitutionally inadequate.

V.

Appellees are not asking for any special or novel Constitutional rule because of their impoverished circumstances. They seek only the time honored procedures afforded by reflex to our more advantaged citizens in dealing with the Government, procedures which themselves embody the Government's respect for the elementary rights of individuals. The plea for administrative flexibility is irrelevant to the issues herein. This Court is asked to affirm the *minimal* safeguards formulated and applied by the court below in response to the evils and abuses in the prevailing system of welfare administration, duly documented in the record of this case, and in the absence of alternatives which effectively control these evils. These minimal safeguards do not impose rigidities or prevent administrative flexibility to deal with problems, if and when they arise. Affording welfare recipients procedural due process of law in no way creates a Constitutional straitjacket.

I.

Due process requires a hearing on the revocation of public assistance benefits.

A. *Appellant's Asserted Distinction Between the Procedure Required for the Protection of "Private Rights" and Other Unspecified Legal Interests Is Inadequate for Determination of the Requirements of Procedural Due Process of Law.*

Appellant concedes that:

> "The need for aid is acute and in many cases chronic. The individual cases rightfully should elicit compassion, understanding and financial aid. A civilized society should do no less and probably should do much more than has been done to date" (Br. 11-12).

But, he argues, recipients of statutory assistance are not entitled to the procedural safeguards constitutionally guaranteed to "private rights." The implicit premise is that, since the state's decision to afford statutory aid is not constitutionally compelled, the dispensing power should not be confined to the norms of due process of law.

Although the viewpoint is reflected in the early history of government subsidies and relief programs, particularly as a limitation on substantive constitutional claims (see *Hamilton* v. *Regents of the University of California*, 293 U. S. 245 (1934); *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220 (1893)), it may no longer be seriously contended that the capricious or invidious revocation of government benefits may be justified by simple characterization of their receipt as a "privilege" rather than

a "right." Substantively, this Court has consistently held that government benefits or entitlements, such as unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398, (1963), or a tax exemption, *Speiser* v. *Randall*, 357 U. S. 513, 519-520 (1958), or the rather more discretionary privileges, such as government employment, *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956), cannot be conditioned on the relinquishment of constitutional protections, including those inhering in the constitutional guarantees of due process and equal protection as well as in the Bill of Rights. *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952); *Douglas* v. *California*, 372 U. S. 353 (1963). Cf. *Traux* v. *Raich*, 239 U. S. 33 (1915); *Zemel* v. *Rusk*, 381 U. S. 1 (1965). A state may not impose arbitrary distinctions in the availability of statutory benefits, *Levy* v. *Louisiana*, 391 U. S. 618 (1967). These substantive constitutional protections assuredly apply to the public assistance programs. *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *King* v. *Smith*, 392 U. S. 309 (1968); *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1115-1116 (D. C. Me., 1969) (where additional authorities are collected); cf., *Flemming* v. *Nestor*, 363 U. S. 603 (1960).[9] The absence of constitutional compulsion behind the granting of statutory rights, privileges and opportunities provided no resolution to the constitutional issues presented in these cases.

The notion that whatever the government undertakes to afford it can precipitously and arbitrarily revoke has played no significant role in this Court's resolution of questions

[9] *See generally*, Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harv. L. Rev.* 1439 (1968).

of the requirements of procedural due process. It was expressly rejected in *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886 (1961), where the Court, though upholding the denial of confrontation in the circumstances of that case, stated:

> "This question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.' " 367 U. S. 886, 894.

Even where the government power has been deemed plenary, as in the expulsion of resident aliens, *Galvan* v. *Press*, 347 U. S. 522 (1954), this Court has consistently held, from as early as 1903, that a resident alien is constitutionally entitled to a due process hearing prior to expulsion. *The Japanese Immigrant Case*, 189 U. S. 86 (1903); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950). The agency's obligation to turn procedural corners rests not on the individual's vested right to remain but because deportation may deprive one "of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922). Similarly, this Court has long held that administrative power to require a showing of good character or fitness in licensing real estate brokers or accountants must mean authority "exercised after fair investigation, with such a notice, hearing and opportunity to answer . . . as would constitute due process." *Goldsmith* v. *Bd. of Tax Appeals*, 270 U. S. 117, 123 (1925); *Bratton* v. *Chandler*, 260 U. S. 110 (1922).

More recently this Court held that admission to practice law could not constitutionally be denied on the basis of the opinion of a character committee without an adversary hearing affording both confrontation and cross-examination. *Willner* v. *Comm. on Character & Fitness,* 373 U. S. 96 (1963). The right to practice was not discussed, except to say that it "was not a matter of grace and favor." 373 U. S. at 102. *Cf., Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238-239 (1957). This Court has required an adjudicatory hearing in areas where both the existence of entitlement and the standards of eligibility for the entitlement are less clear than they are in public assistance, as in the loss of public employment, *Slochower* v. *Board of Higher Education, supra,* or the loss of employment with a government contractor. *Greene* v. *McElroy,* 360 U. S. 474 (1959).

Rarely has this Court dealt with a total denial of the opportunity to be heard. *Cf., Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950). But the rare and special instances in which denial of a specified element of due process has been upheld by this Court serve to underscore the position of such procedural rights in our constitutional hierarchy of values. This Court, often divided, has sanctioned such where the Attorney General states that disclosure would endanger the national security, *Bailey* v. *Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), *aff'd per curiam* 341 U. S. 918 (1951); where Congress has exercised a plenary power over foreign relations or control of the boarders, *Ludecke* v. *Watkins,* 335 U. S. 160 (1948); *Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950); where the government is engaged in a military, proprietary or managerial function, *Cafeteria Restaurant Workers Union* v. *McElroy,* 367 U. S. 886

(1961); where broad discretion to suspend a sanction is committed to the Attorney General or other high official, *Jay* v. *Boyd,* 351 U. S. 345 (1956). These decisions but confirm the general rule that "[t]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123 at 168 (1951) (Frankfurter, J., concurring).

The federal courts have similarly held that procedural due process must be afforded in the administration of benefit programs, including those with a greater amount of selectivity and administrative discretion than public assistance—government contracting, university education and public housing. The D. C. Circuit Court in *Gonzalez* v. *Freeman,* 334 F. 2d 570 (D. C. Cir. 1964), noting that the terms right or privilege "tend to confuse the issue," held that one cannot be barred from continuing to contract with the Commodity Credit Corporation "without an opportunity for a full hearing." There may be no right to contract, but

> "that cannot mean that the government can act arbitrarily, either substantively or procedurally, against the person, or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts,"

particularly where

> "[the] interruption of an existing relationship between the government and a contractor places the latter in a different posture . . . and can carry with it grave economic consequences." 334 F. 2d at 574.

The Fifth Circuit, in *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150, *cert. denied*, 368 U. S. 930 (1961), required an adversary hearing on a disciplinary expulsion from a state university, since one's interest in education is, however characterized, of great value and "the possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rules to the facts in a particular case." *Id.* at 157.[10] Federal courts have also held that a public housing authority must afford some opportunity to be heard prior to the initiation of summary eviction proceedings in landlord-tenant court.[11] *Holt* v. *Richmond Redevelopment and Housing Auth.*, 266 F. Supp. 397 (E. D. Va. 1966); *cf. Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969).

The cardinal factor in all of these cases is the impact and character of the administrative determination against the individual.[12] The individuals therein had no unalter-

[10] Similarly, in *Wasson* v. *Trowbridge*, 382 F. 2d 807 (1967), the Second Circuit held that a cadet could not constitutionally be expelled from the United States Marine Academy for "excessive demerits" without full notice of the charges and the case against him in an adjudicatory proceeding. Compare *Madera* v. *Bd. of Educ. of New York City*, 386 F. 2d 778 (2d Cir., 1967).

[11] The public housing situation is distinguishable, however, from the instant case, in that the *ex parte* decision to evict requires some form of judicial proceeding to implement. *See Thorpe* v. *Housing Authority of Durham, supra.*

[12] The courts of appeal have also held that due process requires an adjudicatory hearing with respect to the denial or suspension of a liquor license, *Hornsby* v. *Allen*, 326 F. 2d 605 (5th Cir. 1964); *Minkoff* v. *Payne*, 210 F. 2d 689 (D. C. Cir. 1953); of a license to operate as a bail bond surety, *In re Carter*, 192 F. 2d 15 (D. C. Cir. 1951) *cert. denied*, 352 U. S. 862 (1951); of a radio license, *Homer* v. *Richmond*, 292 F. 2d 719 (D. C. Cir. 1961); of a permit to serve as a merchant marine, *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir. 1955).

able or vested "right" to the benefits, but they did have a constitutional right to a proper determination of the legal and factual predicates on which the administrative action affecting a substantial interest was premised.

In the court below, the Appellants conceded that constitutional requirements apply to the administration of public assistance and did not suggest that a distinction between private "rights" and other unspecified legal interests justified a uniquely diluted version of due process for recipients of public assistance. In light of these cases, the City Administrator's attempt to resurrect this distinction in this Court to justify "flexibility of procedure" does not advance the inquiry of "what minimal procedural safeguards are required here" (380a).

We turn now to that inquiry. The Constitutional standards for "the protection of the individual against arbitrary action," *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 302 (1937), are not arcane. "Consideration of what procedures due process may require . . . must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers* v. *McElroy, supra,* at 895. "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations to be taken into account." *Hannah* v. *Larche,* 363 U. S. 410, 442 (1960). We set forth these elements—the impact and character of the administrative decision, the nature of the individual and governmental interests, and the nature of the decision making process—to establish the threshold right to procedural due process and the foundation for the timing and content of the hearing.

B. *Home Relief and AFDC Are Statutory Entitlements Afforded as of Right to All Eligible Individuals.*

The federal and state statutes governing AFDC and Home Relief now establish a statutory right to benefits commensurate with the critical individual needs and expectations which these programs are intended to meet. The substance of this statutory entitlement is well revealed in the evolution of AFDC and Home Relief from the pre-Depression pattern of relief. Prior to 1935, relief was administered as an act of charity, private and public, through thousands of poor relief agencies. Benefits were a discretionary "dole" dispensed in whatever amount and on whatever conditions a social worker saw fit to formulate. There was no attempt to define who was "eligible" or to give aid to more than a fraction of those similarly in need.[13] Aid was confined to the "worthy" poor and recipients were subjected to civil disabilities and severe behavioral restraints to keep them worthy.[14] Withdrawal of aid was as whimsical as its dispensation. Not surprisingly, a rule of law had no function in this system of relief; courts abstained on the ground that welfare was a gratuity or a privilege to be administered with complete discretion. *City of Albany* v. *McNamara,* 117 N. Y. 168, 174, 22 NE 931 (1889); *Wilkie* v. *O'Connor,* 261 App. Div. 373 (NY 1941).

The Social Security Act of 1935, though reflecting a limited view of federal powers, *cf., Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Schecter Poultry Co.* v. *U. S.,* 295 U. S. 495 (1935), sharply departed from this pattern by establishing a uniform statutory "right" to public assist-

[13] *See* Bell, Aid to Dependent Children, 11-19 (1965). *See also* Abbott, E., Public Assistance 35 (1966).

[14] Abbott, G., From Relief to Social Security, 227 (1966).

ance benefits and requiring fair methods of administration respecting this right. Hence, the Act required that the state agency provide an opportunity for a "fair hearing" to all aggrieved applicants and recipients, 42 U. S. C. §602(a)(4); provide safeguards on the use or disclosure of information concerning recipients, 42 U. S. C. §602(a)(9); provide aid in the form of cash payments without restrictions on use, 42 U. S. C. §§603, 606; and provide a uniform program throughout the state under the administration or supervision of a single state agency. 42 U. S. C. §602(a)(1) and (3).

The concept of entitlement gave rise over the years to an expanding network of federal and state legislative controls on the conditions of eligibility for aid. As this Court recounted in *King* v. *Smith*, 392 U. S. 309 (1968), this evolution confirmed the rejection of the pre-Depression standard of "worthiness" as the touchstone of aid. "Federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy person' concept of earlier times." 392 U. S. at 324-25. All persons sufficiently disadvantaged to fall within the category singled out for aid and who lack the resources and income deemed necessary for survival, are, as a matter of statutory right, entitled to assistance. Waiting lists or other mechanisms of selecting among eligible persons are legislatively prohibited. 42 U. S. C. §602(a)(10).[15] These programs accordingly are without the selectivity and unarticulated administrative preferences inherent in benefit programs with a limited number of units or places, such

[15] *See*, In the Matter of: The Petition of the State of Georgia for Reconsideration of Its Proposed Implementation of Section 208(b) of P. L. 90-248 Before the Administrator, Social and Rehabilitation Service, Department of Health, Education and Welfare (April 2, 1968).

as public housing, 42 U. S. C. 1401 *et seq.*,[16] Head Start, 42 U. S. C. §2809(a)(c)(1), or employment training, 42 U. S. C. §2571 *et seq.*[17] As Congress succinctly put it for AFDC:

> "*aid . . . shall be furnished with* reasonable promptness *to all eligible* individuals." 42 U. S. C. §602(a)(10). (Emphasis added.)[18]

New York statutes establishing Home Relief and AFDC impose the identical command.[19] These provisions create both a duty on the part of welfare administrators to grant assistance to all eligible individuals, and a correlative right in those individuals to receive such assistance.[20]

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[16] Nonetheless, admissions standards and procedures must comply with due process and equal protection requirements. *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968); *Thomas* v. *Housing Authority of Little Rock*, 282 F. Supp. 575 (E. D. Ark. 1967).

[17] *See generally*, Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

[18] This provision, added in 1950, was "to make it clear" that all eligible persons must be given assistance. 1950 U. S. C. Cong. Serv. pp. 3470-71. See, *King* v. *Smith*, *supra*; *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1968).

[19] "Each public welfare district *shall* be responsible for providing aid to dependent children under this title *to persons eligible therefor* who reside in its territory." N. Y. Soc. Serv. L. §344(3) (McKinney 1966). "Any person unable to provide for himself . . . who is not receiving needed assistance or care . . . *shall* be eligible for home relief." *Id.* §158. (Emphasis added.)

[20] The regulations issued by the Department of Health, Education and Welfare (H. E. W.) pursuant to 42 U. S. C. §602(a)(10) speak in terms of entitlement throughout. They recognize the individual's right to know about the public assistance programs, to apply for them, and to receive payments if found to be eligible, to be informed about "their rights and obligations under the program," and require that "assistance will be provided promptly and will continue regularly to all eligible persons until they are found

(*footnote continued on next page*)

To be sure, the pre-Depression pattern has had its due and there are within the legislative guidelines of need and dependency numerous administratively defined economic and non-economic grounds for disqualification. Administrative standards, whilst sometimes vague and often evaluative, do not purport, however, to represent unfettered dis-

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to be ineligible." Handbook of Public Assistance Administration Part IV, §2200(b)(1-4). They mandate the states to formulate procedures for determining eligibility which

> "respect the rights of individuals under the United States Constitution, the Social Security Act, . . . and all other relevant provisions of Federal and State laws; and will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights." Handbook of Public Assistance Administration, Part IV, Sec. 2200(a).

The most recent H. E. W. regulation on eligibility, 45 C. F. R. §205.20 (Jan. 24, 1969), requires:

> "payment of assistance to all individuals who are eligible and denial to (those) who are not eligible; procedures which are simple, efficient . . . ; and full respect for the rights and dignity of applicants for, and recipients of, assistance."

Other sections of this recent regulation repeatedly describe the assistance grant as an "entitlement". 45 C. F. R. §205.20(a)(6) and (c)(1)(i).

Even before §602(a)(10) was added, HEW had stated that:

> "State laws specify the eligibility requirements in effect in the public assistance programs. This specification removes from the discretion of the administration the right to exclude persons falling within the scope of the program, because all persons meeting the eligibility qualifications are equal before the law and have a right to receive assistance under a uniform application of the law. The right of eligible persons to receive assistance is also inherent in the requirements of the Social Security Act for the development and operation of State plans. Methods of administration necessary for proper and efficient operation of State plans are interpreted to include standards and procedures which protect this right for each individual by making the opportunity to apply for assistance freely available and by granting assistance promptly to each eligible individual."
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> Handbook of Public Assistance Administration, Part IV, §2321 (Sept. 3, 1947).

cretion or simple assessment of worthiness. Since they now affect the scope of a statutory entitlement, they are subject to legal challenge and review. When contained in a state AFDC plan, the eligibility standards are administratively approved only if consonant with the specific requirements of the federal Act and only if "rational . . . in the light of the purposes of the public assistance programs.[21]

They are also subject to judicial scrutiny, affirming that eligible individuals have a statutory right to receive benefits and that administrative caprice may not nullify this right. As this Court stated in *King* v. *Smith*, 392 U. S. at 317:

> One of the statutory requirements is that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . ." (citations omitted.) . . . sec. 406(a) of the Act defines a "dependent child" as one who has been deprived of "parental" support . . . *In combination, these two provisions of the Act clearly require participating States to furnish aid to families who have a parent absent from the home, if such families are in other respects eligible.* See also, Handbook, Part IV, sec. 2200(b)(4).[22] (Emphasis added.)

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[21] A. Willcox, Memorandum Concerning Authority of the Secretary, Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of its Limitations on Eligibility, March 25, 1963. H. E. W.'s authority for such review stems from its obligation to provide proper methods of administration. Proper administration of this entitlement itself imports a statutory equal protection clause into the federal act. *See generally*, "Welfare's Condition X," 76 *Yale L. J.* 1222 (1967), *cf. Steele* v. *Louisville & Nashville R.R.*, 323 U. S. 192 (1944).

[22] The Court thus endorsed the ruling of the court below in *Smith* v. *King*, 277 F. Supp. 31 (M. D. Ala. 1967), that:

(*footnote continued on next page*)

See also, *Shapiro* v. *Thompson, supra; Williams* v. *Dandridge,* 297 F. Supp. 450 (D. Md. 1969); *Rothstein* v. *Wyman,* —— F. Supp. —— 69 Civ. 2763 (S. D. N. Y., August 4, 1969); *Dews* v. *Henry,* 297 F. Supp. 587 (D. Ariz. 1969); *Solmon* v. *Shapiro,* —— F. Supp. —— (Civ. No. 12,790, D. Conn. April, 1969); *Doe* v. *Shapiro,* —— F. Supp. —— Civ. No. 13,093 (D. Conn. August, 1969).[23] This statutory entitlement has been recognized by the New York courts as well:

> "It is the statutory duty of the commissioner to provide adequately for those unable to maintain themselves. Indigent people are entitled to such payments as a matter of law." (Under New York's Social Services Law.)
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> *Hunt* v. *Bonilla,* —— M. 2d ——, —— N. Y. S. 2d —— (N. Y. L. J., April 8, 1968, p. 18, col. 3, N. Y. Sup. Ct.)[24]

. . . Aid to Dependent Children financial assistance is a statutory entitlement under both the laws of Alabama and the federal Social Security Act, *and where the child meets the statutory eligibility requirements he has a right to receive financial benefits under the program . . . (C)lassifications may only be created which are rationally related to the purpose of the federal and Alabama Aid to Dependent Children statutes.* (Emphasis added.)

[23] *See also, Board of Social Welfare* v. *Los Angeles County,* 27 Cal. 2d 81, 86, 162 P. 2d 630, 633 (1945) ("The obligation to pay became a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid.") and *Conant* v. *State,* 197 Wash. 21 (1938).

[24] As a three-judge court recently stated in *Doe* v. *Shapiro*:

"Under the Social Security Act, a child is eligible for and entitled to AFDC assistance if he is both 'needy' and 'dependent.' A child is 'needy' if he 'does not have the income and resources sufficient to assure economic security' when measured against standards of need established by the indi-

(*footnote continued on next page*)

The cumulative impact of the statutes, regulations and judicial decisions makes it clear that this is not a case in which the legislature has delegated unreviewable discretion to an administrative agency or official. Cf. *Norwegian Nitrogen Products* v. *United States*, 288 U. S. 294 (1933). No legislative judgment is being assailed. The philosophy that needy citizens are "non-persons" allowed to receive state charity at the whim of an administrator is not a part of AFDC or Home Relief.[25]

C. *The Entitlement to Home Relief and AFDC Is Afforded Only to Destitute Persons and Families Without Resources, Income and Alternative Sources of Support Who Are Starkly Reliant on the Bi-Weekly Subsistence Grant.*

The statutory entitlements at stake here under these residual assistance programs are the last resource for individuals and families who have been found to be unable to support themselves or to qualify for other forms of public aid, and who have no other private source of sup-

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vidual states. HEW, Handbook of Public Assistance, Part IV, §3120. A child is 'dependent' if a parent is continually absent from the home. 42 U. S. C. §606(a). These are the only two eligibility requirements which Congress has imposed." Civ. No. 13,093, *supra* at 6.

[25] The concept of entitlements under these programs has been the subject of much scholarly discussion. See Reich, "The New Property," 73 *Yale L. J.* 733 (1964), and "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965); Graham, "Public Assistance: The Right to Receive; the Obligation to Repay," 43 *N. Y. U. L. Rev.* 451 (1968); Note, "Social Welfare—An Emerging Doctrine of Statutory Entitlement," 44 *Notre Dame Lawyer* 603 (1969); see also, Notes, "Welfare's Condition X," 76 *Yale L. J.* 1222 (1967), and "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 *Yale L. J.* 1234 (1967). But its root meaning in AFDC and Home Relief is "objective eligibility safeguards against revocation or loss of benefits." Reich, "Emerging Legal Issues," *supra*, at 1256.

port. As a prerequisite of receiving aid, an individual must show that he is unable to work because of age, infirmity, disability or the need to care for young children. Individuals who are capable of working must show that they have diligently sought employment and work is not available. 42 U. S. C. §602(a)(19); N. Y. Social Services Law §131(4) (McKinney 1966).[26] The pervasive criteria of economic need and dependency assure unqualified reliance on the bi-weekly grants for the basics of life—food, shelter, and clothing. The aid afforded is penurious and permits neither common amenities nor savings of any kind.[27] To qualify and remain qualified for aid, the family must report and relinquish to the agency all assets and property unre-

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[26] Some individuals receiving aid are working, but receive wages so low that the family income falls below subsistence levels.

[27] The gross inadequacy of the public assistance grant, even in a relatively progressive state such as New York, is well documented. The Commissioner of the Nassau County Department has stated that, even prior to the recent reductions of grants in New York the "standards of assistance provide for life on a level of subsistance, nothing more, and often less." *Rosado* v. *Wyman*, —— F. Supp. ——, 69 Civ. 355 (E. D. N. Y. 1969), rev. other grounds, —— F. 2d —— (Nos. 711, 726, 729, 2d Cir. 1969). The amounts provided are substantially lower than the standards which have been determined to be minimally necessary for a low-income urban family by the U. S. Bureau of Labor Statistics, the U. S. Department of Agriculture, the Community Counsel of Greater New York and several other reputable public and private agencies. New York currently provides 66¢ per person per day for food. No allowance whatsoever is made for necessities such as home furniture, school clothing, winter coats and boots, or for "luxuries" such as newspapers, telephone calls, babysitters, suspenders, cosmetics, cigarettes, birthday presents or parties, or any form of entertainment. Since costs for the non-food components of the budget—rent and utilities—are fixed, any purchase of an item not provided for must be made from the 66¢ a day allotted for food. N. Y. Soc. Serv. L. §131-a, added by L. 1969, Ch. 184.

lated to current basic needs.[28] The severity of such resource restrictions and the meagerness of the bi-weekly grant do not allow one to budget for any contingency, including administrative error, which, as will be shown, is considerable. As the court below found, "There is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets" (372a).

D. *The Erroneous Revocation of Entitlement and Withdrawal of Aid Works Immediate and Irremediable Harms Jeopardising Critical Aspects of Individual and Family Life and Liberty.*

In light of the stark reliance on the bi-weekly grant, "the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance" (376a) is both obvious and inescapable. When aid is erroneously withheld, the entire quality of life—sometimes even life itself—is placed in immediate jeopardy. The Appellees herein are no worse than typical, less in some cases because of this suit. But they illustrate the immediacy of the impact of withdrawal. After termination, Angela Velez and her four young children were evicted for non-payment of rent and all forced to live in one small room of a relative's

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[28] The exceptions show the rigor of the rule. New York allows recipients to retain $500 for a burial fund, but requires that this fund be given to the Department to be held in trust. 18 NYCRR §§352.8(a)(1) and (b)(4). A family may continue to live in their home or cooperative apartment only if the mortgage payments are less than it would minimally cost for other shelter and if they give the state a lien on the property which permits the Department to make recovery for all assistance paid if the family ever becomes solvent. 18 NYCRR 352.8(a) and (d). Life insurance policy may be retained only if the face value is less than $500. 18 NYCRR §352.8(c)(2).

already crowded apartment (187a). The children had little to eat during the four months it took for the Department to correct its error. Esther Lett and her four children at once began to live on the handouts of impoverished neighbors (78a); within two weeks all five required hospital treatment because of the inadequacy of their diet (72a). Soon after, Esther Lett fainted in a welfare center while seeking an emergency food payment of $15 to feed herself and her four children for three days. Pearl Frye and her 8 children "had gone hungry," living on peanut butter and jelly sandwiches and rice supplied by friends who were also dependent on public assistance (37a). Juan DeJesus found himself homeless, living in temporary shelter provided by a friend (17a). Other plaintiffs lived on the money extended by their counsel (42a, 97a), or friends (17a, 97a). The record, however, cannot document the impact of erroneous termination on the children in these families, the unmeasurable toll on their capacity to learn and to mature into healthy and productive citizens.

These harms are inescapable in most every case of *erroneous* termination and they occur immediately upon such termination, often as intense in the early days as afterwards. They comprise a syndrome beginning with eviction and deprivation of food and other necessities, including health services,[29] and ending with private handouts for

[29] Eligibility for public assistance is the basic condition for the receipt of health care and services under the Medicaid program in most states. 42 U. S. C. §1396, *et seq.* Even where Medicaid benefits are afforded to the medically indigent, a broader category than public assistance, revocation of eligibility for public assistance terminates one's eligibility for Medicaid benefits and a new application for such benefits must be filed. The unreviewed basis for termination renders a new application uncertain.

the fortunate and illness, family disintegration, institutionalization and hospitalization for the less fortunate. Rarely, if ever, does administrative action, adjudicatory in nature, in revoking a statutory right, result in such irremediable and wholesale harms upon individuals, certainly without first affording notice and an opportunity to contest the basis of the decision causing such grievous injury. Cf., *Ng Fung Ho* v. *White, supra.*

E. *The Complexity of the Factual and Evaluative Issues Involved, the Characteristics of the Decision Makers, and the Consequently High Probability of Administrative Error Render an Adequate Hearing Peculiarly and Extraordinarily Necessary.*

The statutory right to assistance requires that termination of aid to persons found eligible must rest upon an administrative re-determination that the individual is no longer eligible. To deprive one of the statutory entitlement, there must be an administrative investigation and decision, supported by findings, that the individual now offends one of the prescribed conditions of eligibility. The applicable regulations make this clear. After making a finding of eligibility, the agency may not cease or reduce payments while investigating a family's current situation or evaluating information it may have received which appears to raise a question of continuing eligibility. H. E. W. Handbook, PT. IV, §2200(b)(4).[30] Similarly, the New York

[30] The United States informed the court below that "until the agency has made a definite determination of ineligibility . . . payments must continue as before." Brief Amicus Curiae of the United States, *Kelly* v. *Wyman*, at 4. A decision that a recipient is no longer eligible must be "based on facts—statements about eligibility requirements that have been substantiated by observation or written records, or other appropriate means." The decision and its support must be recorded in the case record maintained for each recipient. H. E. W. Handbook §§2220, 2230(3), March 18, 1966.

State regulations authorize termination after the agency "verifies ineligibility" 18 NYCRR §351.22.[31] Hence, a foundation for revocation of aid has long been required. It is the process of *ex parte* formulation of this foundation under the applicable standards by agency casework personnel which demonstrates the Constitutional necessity for and function of an opportunity to be heard.

Initial eligibility is established only after exhaustive investigation and findings on an extraordinary range of factors deemed relevant under this system to need and dependency.[32] In every case there is individual verification of every relevant aspect of an applicant's life, 18 NYCRR §§351.1 and 351.2, since under the premise of distrust characteristic of welfare administration, inquiry must be penetrating and comprehensive. 18 NYCRR §351.7. Although recipients are required to report any material change in

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[31] The regulation also requires that information suspecting possible ineligibility be investigated within 30 days, 18 NYCRR §351.22(b), and provides that "the findings of the investigation . . . together with the recommendation [be] reviewed by the supervisor." 18 NYCRR §351.24.

The New York City regulation states that: "Upon completion of the investigation or reinvestigation . . . it is the Investigator's responsibility to recommend . . . that assistance be continued or withdrawn. This recommendation should be based on complete, factual, verified information clearly stated so that there is no doubt as to eligibility . . . " Policies Governing the Administration of Assistance, New York City §174.

[32] These conditions are found in the State statute, rules of the State Board, regulations of the State Commissioner, and bulletins and procedurals of the local agency, 52 N. Y. Soc. Services Law §1 *et seq.* (McKinney 1966), 18 NYCRR, Handbook for Case Units in Public Assistance. They are not easily summarized, but they include the continuous absence of a parent, continuing disability or unemployment, support payments or gifts of any kind, lack of resources or assets, maintaining attendance at school, and so on. See, 52 NY Soc. Serv. L. §§158, 302, 349 (McKinney 1966) and 18 NYCRR §§351.2; 351.6-351.10.

status or income under pain of criminal sanction, 52 N. Y. Soc. Serv. L. §145 (McKinney 1966), caseworker re-investigations are mandatory in AFDC and Home Relief every three months, 18 NYCRR §82.1(b)(2)(i)(2), and more frequently where there is any doubt of continuing eligibility. 18 NYCRR §351.22(b). Considerable casework time is spent in investigating each beneficiary while concurrently providing counseling or social services.

The number and character of the events generating caseworker suspicion and investigation are seen in the factors or reasons for case closings. Most all of these are not susceptible to objective ascertainment; they are very open to dispute. The New York City Handbook lists in seven pages the "reasons for terminations" in the summary form in which they are communicated to clients in the official notice of termination. (See App. C.) They include such economic factors as:

> "employment or increased earnings of any 'person in the home,' including dependent children or boarders; return of parent; receipt of increased support from the father or 'other person outside the home'; receipt or increase of any benefit, pension, life insurance, inheritance; refusal to accept referral for employment or to accept employment; and other material change in income or resources of person in the home."

The non-economic grounds deemed "refusal to comply with Department policy" or "to reveal information which may affect eligibility" are less specific but far more embracing, requiring termination where the recipient

"refused to comply with Department's resource policy; refused to permit collateral visits; refused to explain management; misuse[d] funds; and refused to keep medical placement or *other* appointments."[18]

The congeries of circumstances thought to warrant termination under these standards are well nigh infinite. The instant cases are illustrative.

Randolph Young was terminated for "mismanagement of funds" after he was robbed of $20. (15a); and Mary Holmes was terminated for "mismanagement" when she used rent security money to purchase a bed for her daughter who had been sleeping with her (230a, 234a). Pearl McKinney was terminated because of "failure to get us information concerning [son's] employment," (34a) even though her son did not receive aid and was not legally responsible for her support (33-36a). Pearl Frye was terminated for failure to keep an appointment with the caseworker (17a). Juan DeJesus was terminated because he failed to "produce" a past employer who no longer lived in New York and because he allegedly drank or took drugs (17a). Altagracia Guzman was terminated because she refused to bring a support action against her husband, which she deemed groundless and harassing, since he was making regular contributions to her support (23a). Ina Sidor was terminated because a newly appointed caseworker suspected that she owned a car and some stock, even though those

[18] The State regulations call for termination, *inter alia*, where a parent is no longer incapacitated, an absent parent returns, a parent remarries or returns to full employment, a minor between 18 and 21 leaves school, unexcused absence from the State of any member of the family unit, and, to be comprehensive, where "need does not continue." 18 NYCRR §369.3(c)(1) & (2).

very reasons had been rejected in an appeal from a previous termination (216a, 183a).

The information raising caseworker suspicion or surmise in providing the basis for decision under these standards is generated by a variety of sources. There is simple but serious bureaucratic error, as in Esther Lett's termination because the City Board of Education informed the caseworker that she was currently in their employ when in fact such employment had ceased six months before (79a). There is information from sundry collateral sources, sometimes hostile ones. Angela Velez' landlady, observing Mr. Velez visiting his children, reported his return to the home (186a). Felix Gomez' estranged wife reported that he had bought a two hundred dollar gold watch for his girlfriend (190a). There are other citizen complaints or anonymous letters reporting "facts" about the recipient to the caseworker, supervisors and, indeed, high officials in the Department (257a). There is also unreported and unsubstantiated suspicion. Theresa Negron was terminated because of a suspicion that her husband had returned (169-170a), though the entry in the case record stated that the client had left town (171a, 200a). Too often the adverse information stems from caseworker hostility, annoyance, or altercation with the recipient. Hence, John Kelly was terminated for being missing after a dispute over where he should live; he remained missing after he and a private social worker made repeated attempts to see the caseworker (14a, 105a). Minerva Rodriquez was also deemed "missing" because she was not at home on two occasions when the caseworker made an unscheduled visit to the home (214a).

It is obvious that termination of aid rests upon evaluation of third party information, the exercise of judgment about the character and honesty of recipients, and the application of standards which are both vague and evaluative to a matrix of complex and disputable facts. The alleged facts underlying terminations are obviously controvertible, and indeed they were controverted in the instant cases. So too is the existence of the so-called "department policies" said to be applied. The caseworkers in the instant cases, however, having formed an opinion, either did not learn of the recipient's explanation or did not accept it. The materials for judgment were scant, reflecting either the caseworker's lack of inclination or lack of time to develop the necessary information. It also no doubt reflects the inability of recipients, persons of limited education and articulation, instantly to establish their case to an accusing caseworker in their homes. Even where there was further caseworker inquiry, such was an investigator's search for evidence to substantiate a suspicion and to build a case.

The dynamics of welfare administration and the singular absence of safeguards in the personnel serve to exacerbate the obvious dangers of error and arbitrariness under these standards. Caseworkers, the principal or initial decision-makers in the termination of assistance, are persons without any professional training or education to render either social work judgment or legal assessments. High turnover is chronic throughout the country;[34] in New York City, from one quarter to one half the caseworkers leave every

[34] "Many states have experienced serious difficulty in obtaining competent casework staff and in keeping staff turnover to a minimum." Federal and State Action to Correct Problems of Ineligibility and Incorrect Payment Found in the Nationwide AFDC Review, HEW, Welfare Administration, Bureau of Family Services, Feb. 24, 1964, p. 2.

year.[35] In sum, "the shortage of qualified personnel for social welfare programs is critical . . . . [N]ew programs, and existing programs, are in jeopardy unless prompt and effective action is taken to assure a sufficient supply of manpower with skills and knowledge." [36]

The law which these untrained workers are empowered to administer is both intricate and not readily available.[37] Simplification for caseworkers, however, is achieved through vagueness and equivocation on the critical questions of eligibility.[38] Local policies thus become

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[35] Glaser, "Beyond Income Maintenance, A Note on Welfare in N. Y. C.," 15 The Public Interest 108 (Summer 1969) reports turnover rates of 24% and 40%.

[36] HEW, Report of the Advisory Council on Public Welfare (1966) 75; see also, *Report on States with Increased Rate of Payment Errors from 1963 to 1964*, Memorandum from Fred Steininger, Director, HEW Bureau of Family Services, to Ellen Winston, Commissioner of Welfare, HEW, May 3, 1965, at 2.

[37] The law governing public assistance eligibility is found in a plethora of sources. In addition to state and federal statutes, there are six volumes of federal regulations, state regulations and bulletins of the State Commissioner, rules of the State Board, volumes of fair hearing decisions, supposedly binding on caseworkers and published to enable them to avoid the errors of their colleagues, and the local agency materials. The City materials include a lengthy statement of policies and a handbook for case units, each of which are supplemented by informationals, procedurals, and executive orders, which are issued with great frequency.

See, Brier: "Welfare from Below: Recipients' Views of the Public Welfare System," 54 *Calif. L. Rev.* 370, 378 (1966); Keith-Lucas, Decisions About People in Need 165 (1957).

The state and local regulations are often considered confidential and clients and their counsel are denied access. Bell and Norvell, "Texas Welfare Appeals: The Hidden Right," 46 *Tex. L. Rev.* 223, 226, n. 31, 241 (1964).

[38] Despite federal requirement that states provide specific standards to determine who is to be compelled to work, 42 U. S. C. §602 (a)(19) New York City advises its workers that:

"The mother or other female relative may be considered available for employment or training where this is desirable and

"frameworks into which an administrator can put his own ideas or in which other criteria may freely interplay." Keith-Lucas, Decisions About People in Need 243 (1957).

The complexity and vagueness of the standards as well as the ingrained premise that need for assistance implies individual pathology make recipients

"vulnerable not only to the punitive, moralistic official but also to the overzealous, well-intentioned but mistaken official, the social therapist who is certain that he knows what the 'client needs.'"[39] Handler & Rosenheim, "Privacy in Welfare: Public Assistance & Juvenile Justice," 31 *Law & Contemp. Probs.* 377, 393 (1966).

The combination of incompatible functions—investigator and social counselor—renders irresistible the temptation to shape and mold the lives of the poor. The power to

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suitable arrangements can be made for the care of the child or minor. Factors to be considered in developing employment plans are the needs, attitude, and potential of the mother or female relative, the age and needs of the child, as well as the arrangements for his care." Policies Governing Public Assistance §38.

Another example is the requirement that, if aid is to be given, the home be suitable.

"Care provided in the home must be such that his physical, mental and moral wellbeing is protected and his religious faith preserved. The standards generally, provided by the community for self-maintaining families are to be used in evaluating the adequacy of the care received by the child or minor . . ." Policies Governing Public Assistance §37.

[39] Another student has concluded that the typical caseworker is guided by "a more or less vague or even personal, set of values coupled with a belief in one's right or authority to lead clients to these." Keith-Lucas, *supra*, at 151.

terminate for "non-cooperation" or "failure to comply with Department policy" is the bulwark of this temptation. Further, caseworkers are frequently and inevitably influenced by "the deference welfare pays to politics." [40] Welfare recipients are one of the politically weakest, least organized, and least respected groups in our society,[41] particularly as the public image changes from "respectable, aged, white literate citizen in his 'golden years'" to "an uneducated, unmarried Negro mother and her offspring." [42]

Purging the welfare rolls of ineligibles, and the hue and cry of welfare fraud and milching the public fisc is a part of our political rhetoric. The system and its administrators, political appointees, are not impervious to these pressures. Nor are caseworkers and the public.[43] There is consequently the "attempt to influence behavior, at least as far as the grant and eligibility are concerned . . . to satisfy public opinion." [44]

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[40] Bell and Norvell, "Texas Welfare Appeals: The Hidden Right," 46 *Tex. L. Rev.* 223, 234, n. 71 (1967).

[41] "Probably no beneficiaries of a public subsidy have less real influence on the terms and conditions of that subsidy than do the recipients of public assistance." Steiner, Social Insecurity: The Politics of Welfare, 153 (1966).

[42] Steiner, *supra*, at 3.

[43] In response to increasing welfare rolls, the New York City Department has been thoroughly investigated this year by the City Council, the Department of Health, Education and Welfare, and the General Accounting Office. No incidence of fraud has been reported to date. See N. Y. Times at 28 (Feb. 15, 1969) on City Council Investigation; at 1 (Jun. 1, 1969), on General Accounting Office investigation.

[44] Keith-Lucas, *supra*, p. 228. See, generally, Ten Broek and Wilson, "Public Assistance and Social Insurance—A Normative Evaluation," 1 *UCLA Law Rev.* 237, 271 (1954) and 31 *Law & Contemporary Problems* (Winter 1966).

The influence of all these factors on eligibility redetermination need not be left theoretical. H. E. W.'s quality control review of individual case records, with no access to information outside the written case record, reveals that decisions to terminate or deny assistance were erroneous in 6.3% of the AFDC cases across the nation. In New York this rate substantially exceeded the national average at 7.9% for AFDC and 7.0% in the adult categories.[45] Predictably the rate of reversal after hearing is considerably higher. The New York State agency reversed approximately 37% of the terminations that went to hearing during the year ending March 31, 1968, and reversed some 23% of those terminated from June to October, 1968.[46]

The pattern in other states is the same. Clients won 50% of their fair hearings in Texas from 1958 to 1966.[47] The rate climbed to 57% in 1967 and 66% in 1968.[48] Michi-

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[45] The rate of error in the AFDC programs was 16.3% in Pennsylvania, 11.2% in Ohio, and 10.3% in Florida. In the adult categories the leading states are Maryland at 16.3% and Delaware at 10.4%. H. E. W., "Aid to Families with Dependent Children and Adult Categories: Estimated Percent of Negative Case Actions in Which Local Agency Action Was Incorrect, July 1, 1966—March 31, 1967." See also, Greenleigh Associates, *Addenda to Facts, Fallacies and Future: A Study of the Aid to Dependent Children Program of Cook County, Illinois* (N. Y. 1960), p. 122, which reports that 23% of all terminations were invalid or questionable. See also, The Bureau of Social Service Research, *The Ineligibles: A Study of Fifty Families Terminated or Ineligible for Public Assistance* (Washington, D. C. 1963).

[46] 316a-317a, 356a, 358a and 360a. These figures contain an underestimating bias since many applicants withdrew or defaulted after the local agency reinstated aid.

[47] Bell & Norvell, "Texas Welfare Appeals: The Hidden Right," 46 *Tex. L. Rev.* 223, 224 n. 13.

[48] Texas State Department of Public Welfare Annual Reports, Fiscal years ending August, 1967, August 1968.

gan reports that in the first half of 1969, 69% of its termination cases were reversed.[49] Reversals in Louisiana range from some 25 to 29% of AFDC appeals and from 77 to 92% of general assistance appeals.[50] There was also a reversal rate in West Virginia in excess of 25%.[51] This rate of administrative error is truly startling.

F. *The Interest of the State: The Nature of the Governmental Power Exercised Does Not Justify the Abrogation of Traditional Requirements of Due Process.*

Public assistance is not an area in which a special domain of plenary executive or congressional authority, uncluttered by process, may be claimed. Cf., *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886 (1961). The government in the establishment and administration of these programs is not engaged in its managerial or proprietary functions as employer or contractor or in the special sensitive functions of administering military or foreign affairs. Rather, the government is fulfilling its constitutional responsibility in the twentieth century, "to insure domestic tranquility" and "to promote the general welfare" by providing that our most impoverished citizens will have the bare minimums essential for existence, without which our expressed constitutional liberties become meaningless. Aside from the history repudiated by the establishment of these statutory programs, no special reasons for immunity from constitutional guar-

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[49] Michigan State Department of Social Services, Time Intervals Between Date Hearing Request Received im State Office and Date of Final Action, January 1 to June 30, 1969 (mimeo).

[50] Interrogatories V, Nos. 24 and 25, *Lampton* v. *Bonin* (Civil Action No. 68-2092 E. District Louisiana, 1969).

[51] West Virginia Dept. of Welfare, *Annual Report* July 1, 1964 to June 30, 1965, p. 19.

antees exist with regard to the administration to social welfare programs. The paramount purpose of these programs is to protect the economic security of disadvantaged citizens, *King* v. *Smith*, 392 U. S. 309 (1968), *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), to maintain life in accordance with community standards of health and decency, and, additionally in AFDC, to

> "help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self support and personal independence." 42 USC §601.

There is plainly nothing in these legislative goals or the government function to be impaired by the right to be heard. Indeed both the state and federal legislative judgments requiring fair hearings confirm the applicability of due process standards to these programs. The only state interest asserted is the avoidance of expenditures entailed in affording an adjudicatory hearing before termination of aid. Since this interest pertains solely to the timing of the hearing, it will be discussed under that point.

It should be obvious by now that termination of public assistance benefits entails all of the factors which underlie and call into being the Constitutional requirement of due process of law. Administrative action in terminating an individual's grant is plainly adjudicatory, involving the resolution of facts surrounding the conduct and fitness and qualification of particular parties, herein individuals and families, not large groups, Compare, *Londoner* v. *Denver*, 210 U. S. 373 (1908) with *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441 (1915), and the application of rules, regulations and legal consequences to those parties. In these

circumstances, "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960). The controverted issues in termination are peculiarly of the kind subject to the adversary process; they do not relate to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked. *Cf.*, *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96, 108 (1963). Rather, they entail administrative assessments about the honesty and reliability of individual recipients, a determination on which this Court has particularly stressed the right to be heard. *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1925); *Willner* v. *Committee*, *supra*. See also, *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951). The individual interest at stake is in a statutory right on which the very quality of life and liberty depends, itself a weighty factor in the due process decisions of this Court. Compare, *Greene* v. *McElroy*, 360 U. S. 474 (1959) with *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886 (1961); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1953); *Cole* v. *Young*, 351 U. S. 536 (1956). Surely this is not an interest subject "to the arbitrary will of another man who happens to partake of public power." [52] The very unreliability and capricious character of welfare administration renders procedural regularity at least as imperative in welfare cases as in other administrative programs.[53] The need

[52] Jones, "The Rule of Law and the Welfare State," 58 *Colum. L. Rev.* 143, 155 (1958).

[53] See generally, Note, "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 *Yale L. J.* 1234 (1967); Note, "Due Process and the Right to a Prior Hearing in Welfare Cases," 37 *Fordham L. Rev.* 604 (1969); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

for "the protection of the individual against arbitrary action . . ." *Ohio Bell Tele. Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 302 (1937) and against "the play and action of purely personal and arbitrary power," *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886), is certainly as great.

Absent procedural safeguards, there is the real and self-evident danger of an erroneous or groundless administrative decision, which, unsupported by evidence, is arbitrary and hence unconstitutional in an elemental sense. See, *I. C. C.* v. *Louisville & Nashville R.R.*, 227 U. S. 88 (1913); and *Rios* v. *Hackey*, 294 F. Supp. 885 (N. D. Texas 1967). But a valid basis is determined by process, not caseworker whim or surmise. There are also the obvious dangers to other Constitutionally protected freedoms, particularly acute, as recipients begin to organize, petition, and assert their rights to privacy in their homes, *James* v. *Goldberg*, 69 Civil 2448 (S. D. N. Y. June 1969); *Bradley* v. *Ginsberg*, 67-3047 (S. D. N. Y. 1967), and their privilege against self-incrimination, *cf.*, *Doe* v. *Shapiro*, —— F. Supp. —— (Civ. No. 13, 093, D. Conn., August 1949), and their rights guaranteed by the federal Social Security Act.[54]

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[54] *King* v. *Smith*, 394 U. S. 309 (1968); *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1968); *Dews* v. *Henry*, No. —— Civ. ——, 6417 Phx. 2548 Tuc. (D. C. Ariz. —— March 1969); *Solmon* v. *Shapiro*, Civ. No. 12,790 (D. Conn. April 1969); *Jefferson* v. *Hackney*, Civ. Action 3-3012-B, 3-3126-B (N. D. Texas 1969); *Doe* v. *Shapiro*, *supra*.

II.

Due process requires the rudiments of an opportunity to be heard on a contested decision to terminate assistance.

"When the Constitution requires a hearing, it requires a fair one," *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950), "granted . . . in a meaningful manner," *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) and, "aimed at establishing the validity, or at least the probable validity, of the underlying claim." *Snaidach* v. *Family Finance Corp.*, 395 U. S. 337, 343 (concurring opinion). The hearing must be "*appropriate to the case*, and just to the parties to be affected . . . it must give them an opportunity to be heard." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162 (1950) (Emphasis added).

The minimal elements of the right to be heard in a contested administrative proceeding need little elaboration. The party is entitled to know the case against him, to present evidence in his behalf, to confront and question adverse witnesses, and to challenge the applicability of any rule or policy to his case. *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96, 105-106 (1963); *Greene* v. *McElroy*, 360 U. S. 474, 496-498 (1959); *Simmons* v. *U. S.*, 348 U. S. 397 (1955). He is also entitled to a decision based on the evidence presented. *Office of Communication of United Church of Christ* v. *FCC*, 359 F. 2d 994 (D. C. Cir. 1966).[55] These minimal safeguards are particularly

[55] *See also In re Gault*, 387 U. S. 1, 31-34 (1967); *Kent* v. *U. S.*, 383 U. S. 541 (1966); *Reilly* v. *Pincus*, 338 U. S. 269 (1949); *Homsby* v. *Allen*, 326 F. 2d 605 (5th Cir. 1964); and *Hyser* v. *Reed*, 318 F. 2d 225 (D. C. Cir. 1963).

necessary where adjudicatory action "seriously injures an individual." *Greene* v. *McElroy, supra,* at 496; See *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190 (1933). These principles have remained relatively immutable in our jurisprudence. *Hannah* v. *Larche, supra.* They are not disparate "formalities" of a judicial trial; they are the inseparable essentials of an adjudicatory hearing, however brief or informal.[56]

We do not rely solely on rudimentary principles. "The circumstances . . . determine the necessary limits and incidents in the concept of a fair hearing," *Willner* v. *Committee on Character and Fitness, supra,* at 107. As we have seen, the factors involved in the vast preponderance of welfare terminations include a caseworker's resolution of adjudicatory facts and the application of legal rules or policies to such facts; terminations also often rest upon the workers' normative and evaluative judgments. Decisions are based upon sundry third-party information, the observations or suspicions of the investigator, an assessment of client compliance or cooperation with "department policies". Personal animosities between caseworker and client may influence the decision. Termination is sometimes directed from higher echelons of the department (259a). Fre-

[56] The plight of the poor caught in the administrative process has recently attracted substantial scholarly consideration of the application of traditional procedural due process principles in the welfare field. The uniform conclusion is that a hearing containing at least the elements set out above is constitutionally required. Note, "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 *Yale L. J.* 1235 (1967); Morris, "Welfare Benefits as Property: Requiring a Prior Hearing," 20 *Admin. L. Rev.* 487 (1968); Note, "Due Process and the Right to a Prior Hearing in Welfare Cases," 37 *Fordham L. Rev.* 604 (1969); Burrus and Fessler, "Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience," 16 *American University Law Review* 199 (1967); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

quently multiple justifications for the termination are asserted. For all these reasons, a contested decision to terminate aid is a classic situation requiring a structured and adversary presentation to a review officer who has not previously passed on the matters in controversy.

The adversary presentation, though not protracted, is the first reliable revelation of the Department's case and hence the only means of assuring that the recipient "be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence." *Willner* v. *Committee on Character and Fitness, supra* at 107. The hearing also represents the recipient's first effective chance to show that the case against him is unfounded.

The opportunity for rebuttal in an adversary proceeding is particularly important where, as here, the evidence is not documentary but consists of "the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy." *Greene* v. *McElroy,* 360 U. S. 474, 496-497 (1959). "There is no possible way to contest the truthfulness of anonymous accusations." *Jay* v. *Boyd,* 351 U. S. 345 (1956) (Black, J., dissenting). The right to present one's own case through testimony or witnesses is obviously critical where the decision turns on facts pertaining to the clients' actions and circumstances and is in practice frequently influenced by an assessment of the clients' veracity and character.[57]

[57] See, *Rios* v. *Hackney,* 294 F. Supp. 885 (N. D. Tex. 1967), describing a typical welfare termination based solely on third party statements and holding that a hearing affirmance based solely on such hearsay denies due process of law.

"[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver, supra* at 386.

Option b, conceived during this lawsuit, contains none of these rudimentary safeguards. The client learns of "the case" through a notice stating the official category under which his grant will be imminently terminated (e.g., failure to comply with policies, failure to cooperate, excessive resources, misuse of funds). Despite an asserted "intent not to be mysterious," Br. 16, Option b does not suggest or require that caseworkers provide a written report of their investigation and findings, the sources of their evidence, or the regulations or policies deemed applicable.

Option b is also hopelessly *ex parte,* as seen in the document upon which review is primarily based, the client's case record. This record is comprised of the caseworker's own version of conversations with the recipient and others; the caseworker findings are prepared to substantiate the decision and to avoid reversal on review.[58] This dossier is never made available to recipients, before, during or after review.[59]

The client may submit in writing a "statement or other evidence" to sustain his position in a case not yet revealed to him and this must be submitted almost instantly.[60]

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[58] After reviewing case records reflecting hundreds of thousands of decisions, a professor of social work concluded: "How far these records represent actuality is a debatable question." Keith-Lucas, *Decisions About People in Need,* 214 (1957).

[59] See *Turner* v. *Barbaro,* —— M. 2d ——, —— N. Y. S. 2d —— (Sup. Ct., Nassau County, 1968).

[60] Under Option b the client has seven days after the notice of proposed termination is *mailed* to submit documents in opposition.

Marshalling the evidence and submitting persuasive argument under this procedure to reveal error, misinformation and misjudgment would try the wit of astute counsel.[61] It is obvious that for persons, many of whom are functionally illiterate, legally unversed, and without access to counsel, no less instant access, this opportunity to be heard is "cruelly ironic." How does one cast doubt on the credibility of third persons of whom the client is not aware or assail the shortcomings in a record that is not revealed, even in summary form? How does one establish one's own veracity or introduce the testimony of witnesses in a written statement prepared on a one or two days' notice?[62]

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[61] There is no preference in welfare administration for dealing with recipients in written correspondence. Indeed the emphasis is on personal contact through home visits and interviews with collateral sources. Neither recipients nor caseworkers are accustomed to dealing with each other in written correspondence.

[62] Option b as implemented in New York City is also defective because the functionary responsible for conducting the review, the Case Supervisor, is in many cases actually involved in the initial decision to terminate and in the others is in the position of evaluating the actions of his own daily colleagues and assistance. In other cases termination is initiated from above and the Case Supervisor is in a position of reviewing the decision of a superior. This is why case supervisors in New York resisted implementation of New York City's written review procedure (272a-288a). A supervisor with thirty years of experience in the City department testified:

"Case supervisors were consulted and participated in decisions to terminate when the issue was whether there was a man in the house, whether there were hidden resources, whether the family might not actually be living at the address, and so forth. Often this sort of termination resulted from confidential information from a hostile landlord or other source and had not been verified. Another common ground for termination in which Case Supervisors participated was 'refusal to comply with departmental policies.' This often meant that the mother would not give what the Department deems satisfactory information about the whereabouts of the father, even

(footnote continued on next page)

The answer is plain.

Option b is an internal review mechanism to be used by the agency to correct glaring error on the face of the Department's own case records.[63] As such, it is not ineffective, according to Appellant's asserted reversal rate.[64] But it is not, however, an opportunity to be heard.

It is argued here and in *Wheeler* v. *Montgomery*, that procedural deficiencies before termination are cured by the pre-termination personal conference, usually in the recipient's home, at which the caseworker announces his intention to terminate. This conference is simply another required home visit by the caseworker, but with a somewhat greater focus than usual. It has long been a mandatory part of the

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though she may in fact not have known the father's whereabouts" (260a).

A current case supervisor testified:

> "When a case is considered for termination, I am often consulted initially, on either an informal or formal basis for guidance . . . . Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close" (277a-278a).

According to the official state job description, the case supervisor's duties include responsibility for the proper application of policy to individual situations and supervision of the case work staff in administering public assistance. 18 N.Y.C.R.R. §98.7. Indeed, in New York City the Handbook for Case Units and Public Assistance prescribes case supervisor approval for almost every important decision made (300a).

[63] The internal nature of the review is exemplified by the assumption that the caseworker will be consulted during the review, but that the recipient is limited to a written statement *instanter* without knowledge of the content of the case record.

[64] 9 out of 65 cases or 13.8% were reversed (Br. 15).

investigation of continuing eligibility.[65] Appellant now claims that this

> "personal conference is a part of the procedure under attack and can be used by the client as an opportunity to get whatever information is needed to understand the reasons for the proposed termination." Br. 16.

The Department of Health, Education and Welfare characterizes it as an important and mandatory local adjustment process requiring that the local agency

> "gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss the situation before receiving formal written notice of reduction in payment or termination of assistance." Handbook, IV, §2300(b)(5).

The caseworker's routine and well established investigation of the client is thus transmogrified into the client's prior opportunity to contest termination.

However characterized, the caseworker here acts as an eligibility investigator who has tentatively decided to terminate the client. The conference is essentially one between adversaries, albeit very unequal ones, pitting the suspicious caseworker against an often intimidated or hostile client. The exchange is frequently more heated than informative. Except where deemed missing, all recipients in this case had a pre-termination "conference," albeit to little avail. For example:

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[65] H. E. W. Handbook, Part IV, §2300(e)(3). 18 N.Y.C.R.R. §351.23.

> "The caseworker told Mrs. Velez that she could not get the requested items, saying: 'You people think welfare has got to give you for everything.' At this Mrs. Velez lost her temper and told the caseworker, 'You come here to see my needs and you are not doing it. If you are not here to see my needs, what are you doing here? Get out.' The caseworker's reply was: 'You cannot talk to me that way. I can close your case'" (185a).

The scope of the inquiry is entirely in the hands of the investigator; the facts and issues are as he defines them. At this moment, the caseworker neatly combines in his one person the function of legislator, investigator, prosecutor and judge. He indeed represents "the play and action of purely personal and arbitrary power." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886). A caseworker's investigative home visits, threats and interrogations are not new to welfare. They do not constitute an opportunity to be heard but rather underscore the critical need for such opportunity.

III.

Due process requires that individuals previously found eligible for statutory subsistance grants be given an opportunity to be heard before those grants are terminated.

Appellant Goldberg and Appellee Montgomery in *Wheeler* v. *Montgomery* place heavy reliance on the availability on a trial-type hearing substantially after termination of assistance to justify their pre-termination review procedures. The one, they argue, must be "viewed" in light of the other. But the issue of what process is constitutionally compelled cannot be addressed or resolved by indiscriminately viewing a combination of a constitutionally inadequate hearing before termination with a constitutionally untimely one afterwards. Since a written review or conference does not afford any of the safeguards of due process of law, the principal issue in these cases remains as it was at the outset: whether the Constitution requires an opportunity to be heard before the termination of aid. If so, the availability of the hearing afterwards does not cure the deficiencies of the pre-termination procedures.

The issue of *when* a hearing must be afforded is usually synonymous in this Court with the question *whether* due process requires an opportunity to be heard. *Snaidach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). Where it does, there is rarely pause for doubt or discussion on the timing of the hearing. Notice and a hearing necessarily precede administrative action predicated on the very matters sought to be adjudicated and effecting the very harms the contestant seeks to avoid. The function of the right to be

heard is to contest the basis for proposed administrative action, not to obtain a *post facto* review of the correctness of the decision to inflict immediate harm. Cf. *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 593 (1923). The general rule is well settled:

> "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held *before the* final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152-153 (1941). (Emphasis added.)

> "Those who are brought into contest with the government in a quasi-judicial proceeding . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals *before it* issues its final command." *Morgan* v. *United States,* 304 U. S. 1, 25 (1938). (Emphasis added.)

See also, *Londoner* v. *Denver,* 210 U. S. 373 (1910); *Nickey* v. *Mississippi,* 292 U. S. 393 (1934); *U. S.* v. *Illinois Central Railway Co.,* 291 U. S. 457, 463 (1934). ("It is enough that opportunity was given for a full and fair hearing before the order became operative."); *Wilson* v. *Standefer,* 184 U. S. 399 (1902).

Just last term, the issue before this Court in *Snaidach* v. *Family Finance Company, supra,* was not the availability of a hearing *vel non* but its availability before the debtor was subject to the injury resulting from the interim freeze of half his weekly salary. This Court's answer was plain: "It needs no extended argument to conclude that absent notice and prior hearing . . . prejudgment garnish-

ment violates the fundamental principles of due process." 395 U. S. 337 at 342.

As the Court pointed out in *Snaidach*, summary or *ex parte* process has passed muster only in "extraordinary situations" of overriding public necessity. 395 U. S. 337 at 339. The salient factors in these situations attest to the due process values inherent in the timeliness of the opportunity to be heard. Summary termination of welfare benefits can find no justification in the public nuisance cases; persons thought to be ineligible are not akin to dangerous drugs or foods threatening the public health or safety, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950). Nor is termination analogous to the issuance of a provisional restraining order necessary to preserve the issues for review in protracted rate making or other intricate proceedings. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145 (1962); *Halsey, Stuart & Co.* v. *Public Service Comm.*, 212 Wis. 184, 248 N. W. 458 (1933). Public assistance programs bear little resemblance to wartime controls contained in the Emergency Price Control Act of 1942, *Yakus* v. *U. S.*, 321 U. S. 414 (1944) and *Bowles* v. *Willingham*, 321 U. S. 503 (1944), or to the management of a loan association believed to be pursuing a course injurious to creditors and the public. *Fahey* v. *Mallonee*, 332 U. S. 245 (1947). The issue in dispute is assuredly not a question of which party should be the stakeholder of a fund *pendente lite* upon a finding that collection of a federal tax is endangered, itself a power sparingly used. 26 U. S. C. §6658. *Phillips* v. *Commissioner*, 283 U. S. 589 (1931). Further, in all of these cases there were no obvious serious harms which could not be fully remedied in the subsequent review and this Court stressed both the ade-

quacy and effectiveness of the subsequent hearing. "When justified by compelling public interest, the legislature may authorize summary action subject to later judicial review . . ." *Yakus* v. *U. S., supra,* at 442; "Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been sustained." *Phillips* v. *Commissioner, supra,* at 595. *Cf. Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290 (1923).

The appellant's asserted justification for summary termination of aid is that:

> "The cost of the program is enormous. . . . The program adopted by the legislature and supported by hundreds of millions of dollars should [not] be administered without some regard for fiscal control. Some people apply for assistance who are not eligible. Some who are eligible later become ineligible and must be removed from the rolls." Br. 11-12.

This novel justification for summary process calls for close inspection.

First, appellant's reliance on his obligation to terminate ineligible persons is question-begging; the very point of process is to determine who is or who is not eligible. It also ill befits an agency which reverses half of the terminations in which review is sought to rely on the necessity for summary uncontestable revocation of aid.[66]

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[66] New York City Department of Social Services, Review Section Reports for Quarter Ending March 31, 1969, and Months Ending April 30, 1969, and May 31, 1969.

Protection of the public purse is a worthy enough goal, but what precisely is being protected here? The enormous "New York City budget . . . for public assistance," surely does not delineate the interest protected (Br. 11). The premises are unstated but discernible. There is first the interest in those amounts paid to recipients who request a hearing and are ultimately found ineligible. That interest must be viewed against the statutory power to recover the monies paid[67] and more fundamentally, "the power of the state and city to minimize that additional cost by various methods, e.g., by expediting hearings, by increasing the number of hearing officials . . . " (375a). The indigent family suffering erroneous termination has no power to expedite the processes that may ultimately provide relief.

Since the commencement of this action the state agency has taken steps to provide a constitutionally adequate prior hearing in the most economical fashion possible. In describing the decision to adopt the local review procedure sustained below rather than provide that aid be continued pending the statutory "fair hearing," the State Commissioner states:

> "A predetermination local review procedure which meets the test of due process as required under the provisions of Section 351.26(a) . . . is a more effective and expeditious method of preventing error than the fair hearing procedure since such local review can be completed within a period of no more than two weeks,

[67] The State Agency has statutory powers to recover any monies paid during a period of ineligibility. N. Y. Soc. Serv. L. §104 (McKinney 1966), see *Snell* v. *Wyman*, 281 F. Supp. 853 (S. D. N. Y., 1968), aff'd 393 U. S. 323 (1969). Note also that the costs of AFDC are reimbursed by the federal government at a 50% rate. 42 U. S. C. §§1118, 1905.

whereas the fair hearing method takes substantially more time" (App. B herein).

The actual experience in the New York City Department, the largest in the country, confirms the prediction. The hearing process takes one to two weeks and the expenditure incurred is perhaps one more check for the limited number of those seeking review who are found ineligible.[68] This cost is a very miniscule part of the budget set forth in Appellant's Brief. Whether viewed in terms of each individual case (and after all we deal with the due process rights of individuals) or collectively, the amounts involved do not exceed the normal burdens of observing procedural safeguards.[69]

There is also the fear expressed below that the continuation of aid would lead to a greater number of requests for hearings. Hence undue delay in circumstances of immediacy is viewed as a device to limit or eviscerate entirely the due process right to be heard. This is impermissible. "Constitutional rights would be of little value if they could be . . . indirectly denied," *Smith* v. *Alright,* 321 U. S. 649, 664 (1944) ". . . or manipulated out of existence." *Harmon* v. *Forssenius,* 380 U. S. 528, 540 (1965). See also *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1 (1910). Nor can delay be justified as a device to sift out frivolous or unsubstantial claims. For it discourages most if not all claims, deals with the merits of few, and its incidence turns on the hardihood or fortune of individuals in obtaining private aid, not the substantiality of their claims. This Court has

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[68] See App. B.

[69] The added administration cost of six review officers, a supervisor, and supporting staff, is clearly *de minimus.*

invalidated a variety of devices intended to eliminate or discourage proceedings without a determination on the merits. See *Williams* v. *Oklahoma City,* —— U. S. ——, 89 S. Ct. 1818 (1969); *Anders* v. *California,* 386 U. S. 738 (1967); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Draper* v. *Washington,* 372 U. S. 487 (1963).

The wholly unsubstantiated fear of frivolous requests for review is based on the stubborn prejudice or myth that the poor cannot be trusted with rights, procedural or substantive, just as the fear of fraud and predatory invasion were the reasons for widespread durational residency laws. *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). The fear is quite belied by actual experience. The fact is not that the poor abuse their legal rights, but that they do not use them. During a four and a half month period in New York City, in which approximately 60,000 cases were closed, just over 1,000 persons requested review. The entire review system for the city of New York, servicing approximately 375 thousand cases and nearly 1 million individuals, is comprised of 6 review officers and 1 supervisor handling the total caseload of 250 cases a month.[70] The system acknowledges that over 7% of the terminations are erroneous on the face of the record.[71] The city's own 50% reversal rate hardly indicates frivolity or abuse. Prior hearings are now also provided in many states and there is not a scintilla of evidence of abuse or predatory raids.[72]

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[70] New York City Department of Social Services Monthly Statistical Report, March 1969, pp. 6, 7, 10.

In a survey conducted in 1969 by Professor Douglas Quickham of the University of South Carolina, the 29 states responding reported 772,437 terminations for reasons other than death or removal from the state and only 4,032 hearing requests in connection with those terminations.

[71] See note 45 *supra.*

[72] The following states, generally under pressure of litigation, have now changed their regulations to provide for a prior hearing:

(*footnote continued on next page*)

It is not likely that any infusion of legal process will overcome the erosion of spirit and the destruction of self image and personality resulting from welfare's pervasive distrust of the poor.[73]

Mississippi, Manual Sec. F, pp. 6101-6103 (20 days' notice, prior fair hearing); Washington, D. C., Handbook of Public Assistance Policies and Procedures (HPA-II) BR 1.1, III, Sec. 17 (15 days, notice, prior fair hearing); Massachusetts, Manual Sec. App. 12-13 (prior local review); Washington, Manual Sec. 10-41 FF. (prior local review), and, of course, New York, 18 N.Y.C.R.R. §351.26 (prior local review). Statewide injunctions are now in effect in California, *McCullough* v. *Terzian*, No. 379011 (Super. Ct., Alameda County, May 12, 1968) and in Texas, *Machado* v. *Hackney*, —— F. Supp. —— (Civ. Act No. 68-108-SA, W. D. Tex. May 12, 1969). A statewide order is now being drafted in *Bailey* v. *Engleman*, Civ. Act. No. 654-69 (D. N. J.). Prior hearings have been ordered in the Bureau of Indian Affairs general assistance program, *Homer* v. *Hickel*, No. Civ. 69-83-Tucson (D. Ariz. May 14, 1969). We are advised that recipients won 85% of the first 46 hearings held under that order. Letter from Roger Wolf, Director, Papago Legal Services, July 30, 1969. See other cases cited in Appellant's Brief, *Wheeler* v. *Montgomery*, p. 23, n. 29.

[73] New York City Welfare Commissioner James R. Dumpson concluded while in office that:

> "We hold fast to the meanest possible application of a means test that strips those in need, and who muster enough strength to apply for public assistance, of the last vestiges of dignity and self-respect by requiring that they in fact, be paupers ... We prattle about strengthening family life, yet we continue in public assistance practices and regulations to humiliate parents in the process of attempting to help them." James R. Dumpson, "Our Welfare System—Radical Surgery Needed," 23 Public Welfare 226, 230 (1965).

Mitchell Ginsburg, ex-Commissioner of the New York City Department of Social Services, now Human Resources Administrator, summed up his experience before the Kerner Commission in stating: "The welfare system is designed to save money instead of people, and tragically ends up doing neither." Report of the National Advisory Commission on Civil Disorders, at 457 (Bantam Books, New York, 1967).

This is confirmed by a recent study of New York AFDC recipients, financed by HEW and developed under the guidance of the

(*footnote continued on next page*)

But generalized distruct of the poor by our presumably neutral legal institutions is singularly inappropriate. Rates of dishonesty in obtaining public assistance compare quite favorably with those in the collection of taxes and other government programs.[14] The rate of error on the part of the government does not. The myth of the dishonest poor does not create an "extraordinary situation" justifying summary process.

In determining what process is due, this Court cannot ignore the potent impediment to any challenge and review imposed by the dilatoriness of the subsequent statutory hearing. The constitutionally required opportunity to be heard must be more than theoretical, *Brinkerhoff-Farrish Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 682 (1929). *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1944); and *Covey* v. *Summer,* 351 U. S. 141 (1955). "[The opportunity to be heard] must be at a meaningful time." *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1966). This oppor-

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New York City Department of Social Services. It revealed that the process of eligibility determination made over two-fifths of the respondents feel untrusted by the Department, a third feel ashamed, and a quarter feel insulted. Yahr and Pomeroy, "Studies in Public Welfare: Effects of Eligibility Investigation on Welfare Clients" (City University of New York, 1968). See generally Briar, "Welfare from Below: Recipients' Views of the Public Welfare System," 54 *Calif L. Rev.* 370 (1966); Handler, "Controlling Official Behavior in Welfare Administration," 54 *Calif. L. Rev.* 479 (1966).

[14] A recent study of fraud in New York City found that 1.8% of applicants granted aid, and recipients on the rolls, were ineligible. Of course, some of these cases represent error rather than active fraud. *Evaluation of the Welfare Declaration* (Center for Social Research, City University of New York, 1969) p. 3.

There are, of course, criminal sanctions for misrepresentation in the receipt of public assistance, N. Y. Soc. Serv. L. §145, and these are not unused.

tunity cannot be meaningful or adequate where its extreme untimeliness forestalls its use. Untimeliness is well-documented in the record below; in almost every appeal there is month upon month of delay during which time the family is denied the statutory assistance grant. Despite several years of federal and state regulations requiring somewhat less time, the states own statistics show that in almost no case is the decision rendered within three months.[75] This systemic delay is not attributable to the complexity or the protractedness of the hearing itself. Each hearing typically takes less than one hour. It is no doubt attributable to its subsidization by the very withdrawal of aid being contested. Indeed the Appellant implicitly recognizes this subsidization in his express concern that a a greater number of hearings and consequent expenditures would result from continuation of aid until the hearing. The illusory nature of this tardy proceeding is also elo-

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[75] The state's statistics lump together all decisions rendered more than three months after request for a hearing. The available records show an interval of up to 260 days between request and hearing in termination cases, with decisions rendered some 65 to 195 additional days after the hearing (264a, 268a and see Fair Hearing Report for April, 1968 (318a)).

Despite the fact that they commenced this action and the court requested expedition, plaintiff Velez waited four months for a fair hearing decision (364a, 186a); plaintiff Fuller waited at least seven months (328a); plaintiff Sidor eleven months (182a, 324a, & Appendix A); and plaintiff Sheafe four months (76a, 298a). The State itself recognizes this systemic delay in its explanation for the local review procedure (Appendix B).

The record in many other states is no better, although hard data is difficult to obtain. The average elapsed time between a determination to terminate and a fair hearing decision is 196 days in Pennsylvania, *Caldwell* v. *Laupheimer*, Civ. Action No. 69-392 (E. D. Pa. 1969) Interrogatories dated May 13, 1969; and 101 days in Texas, Motion of State of Texas to Stay Enforcement, *Machado* v. *Hackney*, Civil Action No. 68-108-S. A. (W. D. Tex., May 12, 1969).

quently revealed in its practical non-usage in cases of termination.[76]

But even were the State or federally imposed time limits of 30-60 days not merely exhortatory, the subsequent hearing would remain nominal and inadequate. As we have seen the consequences of withdrawal are immediate and intense from the very day the expected check fails to arrive. Neither rent nor daily need for food and other necessities can be postponed. These immediate needs do not leave most people either inspired or able later to pursue an adversary contest with the welfare department. It hardly instills a belief in the efficacy of legal process. And for those who do pursue the subsequent hearing, the interim harms, being irremediable, remain unremedied.

[76] Until 1966, the total number of State hearings in New York on all issues, including initial denial of aid, denial of special grants and terminations, averaged approximately several hundred per year with a statewide caseload of over one-half million recipients. With the advent of welfare rights organizations and fair hearing campaigns for special grants, this figure increased sharply in 1967-1968 with a total of 4,233 hearings requested for 1967. Almost all of these hearings, however, related to denials of special grants. The requested hearings after termination of aid remained negligible, amounting to approximately 50 a month in New York City and 50 a month for the rest of New York State. Recipient caseload during this period increased to approximately one million recipients. (308a-319a, 356a-362a).

IV.

The H. E. W. tentative regulation requiring continuation of aid in some circumstances during the state hearing process is not an alternative basis for affirmance in this case.

Since courts should not decide constitutional issues if a case may be resolved on other legal grounds, *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Thorpe* v. *Durham Housing Authority*, 393 U. S. 268 (1969), the effect of the proposed Regulation of the Department of Health, Education & Welfare (H. E. W.) requires some consideration. 45 C.F.R. §205.10.[11] This proposed regulation, applicable in the categorical assistance programs, including AFDC, would require that in some circumstances the states continue or restore aid when a statutory "fair hearing" has been requested. Although the regulation is a belated and partial recognition that a "fair hearing" must be timely, it does not, for several reasons, resolve the issues in this case.

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[11] "(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance."

A. *The H. E. W. Regulation Does Not Afford Adequate or Effective Protections to Recipients in the Federal Programs.*

First the regulation offers an illusory and uncertain promise of protection to persons in the federal programs. When viewed against three decades of impediments to realization of the statutory hearing and a persistent pattern of undue delay in deciding questions of the greatest immediacy, which continues despite federally-imposed time limits, the validity of this attempt to implement the statutory command for a "fair hearing" can hardly be doubted. The "manifest purpose" of the statutory command that a "fair hearing" be afforded aggrieved recipients, 42 U. S. C. §602(a)(4), is to satisfy the requirements of due process. See *Shields* v. *Utah-Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938). The regulation simply seeks to make the statutory command a realizable right consonant with due process.

Predictably, however, it is being vigorously resisted by H. E. W.'s regulated clientele, the sovereign states. The basis for this resistance may be seen in the very decided state preference for expedited review by the local agency of contested terminations because of the systemic delays in the more formal and cumbersome state hearing process. This is particularly true in states where the statutory hearing mechanism is actually utilized to some degree, *vide* New York and California in the instant cases.[78] See App. B.

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[78] The only sanction available to H. E. W. for the enforcement of the requirements of the federal law is the termination of federal funds. 42 U. S. C. §604. Because of the drastic nature of this remedy, the invocation of which causes severe injury to those very individuals which the Act is designed to protect, H. E. W. has been understandably reluctant to use it. Only once since 1935 have federal funds been terminated in response to state noncompliance with federal commands; in 1938 federal funds to Ohio

(*footnote continued on next page*)

At the time of this writing, the regulation is not in force and H. E. W. has expressed an intent to postpone its effective date, although the states have had somewhat over

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under the Old Age Assistance program were withheld for one month because of gross and persistent mismanagement, including the use of caseworkers to campaign among recipients for the re-election of the incumbent governor. Altmeyer, *The Formative Years of Social Security* 75-83 (1968).

Less understandably, H. E. W. also refuses to conduct conformity hearings even where there is a substantial showing that the state is not conforming to federal requirements. H. E. W. has been supplied documentation of gross non-compliance with fair hearing requirements in many states. *"Alternatives to King v. Smith in Enforcing State Compliance with the Social Security Act,"* Clearinghouse Review, 70-71 (July 1969). New York has acknowledged to H. E. W. a systematic failure to render fair hearing decisions within the federal time limits; Missouri admits non-conformity in the processing of applications. *Ibid.* New York recipients petitioned H. E. W. for a hearing on the state's long-standing failure to comply with federal requirements. *In Re Barbara Stanton, et al.*, filed Feb. 7, 1969. Secretary of H. E. W. Robert H. Finch refused to call a conformity hearing stating: "In the absence of a specific request by the State agency, such hearings are held only on the initiative of this Department as a last resort after questions have been raised . . . [and] deficiencies in that State's public assistance program are so serious, and attempts to obtain correction are so unpromising that Federal payments must be withdrawn." Letter to Richard Flaster, May 6, 1969.

The states are not unaware of the fact that the extreme nature of the remedy of federal cut-off effectively precludes its use, and that, as a consequence, H. E. W. is reluctant to make firm or final findings of non-conformity. The passive and conciliatory manner in which H. E. W. endeavors to obtain state compliance was succinctly put in State Commissioner King's statement in *King* v. *Smith, supra,* that "the Federal Government has never had enough guts themselves to define what a substitute parent policy should be." Appellant Reply Brief, *King* v. *Smith,* at 15.

The immunization of the states from effective enforcement of the federal requirements has had particularly telling effects in the area of state non-compliance with procedural requirements, since the states may promulgate regulations in apparent conformity and then simply fail to follow their own procedures. Clearinghouse Review, *supra* at 70.

ten months to prepare to comply. It is not administrative adjustment which underlies the postponement being considered. In light of H. E. W.'s conceded inability to obtain compliance with the most basic statutory commands in the federal act,[19] compliance with this recent regulatory gloss, however narrowly construed, is not promising. H. E. W.'s unwieldy and unused power to cutoff federal funding is singularly inapt to obtain compliance with procedural regulations. So too is case by case litigation by individual recipients. H. E. W.'s traditional process of negotiation and discussions with the state agency to obtain compliance would doubtlessly be more protracted than usual, and usual means several years. See, *King* v. *Smith*, 392 U. S. at n. 11 and 23.

Second, the H. E. W. regulation does not afford the *minimal* protections of due process of law. For the regulation requires restoration of aid, after termination and

[19] As the New Jersey Director of Public Welfare said, in reference to the H. E. W. hearing regulation, New Jersey "has been opposing and is continuing to oppose the proposed Federal mandates on these issues. In taking this position we are associating ourselves with what we believe is the position of the overwhelming majority of the Council of State Administrators of Public Welfare . . . Accordingly, we are making no plans at the present time for its implementation." Circular Letter No. 609, March 3, 1969, Irving J. Engleman, Director, Division of Public Welfare. N. Y. Welfare Commissioner George K. Wyman has also "filed objection to the proposed Regulations" for a variety of reasons. Administrative Letter No.: 69 PWD-14, Feb. 14, 1969. Steven Simonds, Commissioner of Assistance Payments Administration of H. E. W., informed representatives of organized welfare recipients that the pressures on the Secretary of H. E. W. to withdraw the interim regulation on prior hearing were greater than on any other H. E. W. policy, with the possible exception of the regulations requiring the use of the declaration method for determining eligibility, 33 Fed. Reg. 17189 (Nov. 20, 1968), which has now been withdrawn.

request for review,[80] only in cases "involving an issue of fact or of judgment" about an individual. H. E. W. was not unaware of the difficulties and possibilities of nullification inhering in this limitation. But the limitation represents H. E. W.'s concession to the intense opposition of the states.

Whatever its political wisdom, the limitation is not consonant with due process of law. To be sure, due process does not require adjudicatory review of government action in all circumstances. Where ineligibility under clear legal standards is apparent on the face of documents furnished by a party or other undisputable objective material, such as a death certificate, an adjudicatory hearing is not required. See, *F. P. C.* v. *Texaco,* 377 U. S. 33 (1964). Indeed, the New York regulation sustained below makes provision for these situations by specifying the circumstances in which aid need not be continued.

By hypothesis, however, we deal here with the minimal procedural safeguards for a *contested* decision to terminate. The investigator has made particularistic factual findings, applied what he deems to be agency policy and reached a decision to terminate. The focal point of the caseworker's concern may not be defined or communicated to the recipient at this preliminary investigative stage. The basis for termination is certainly not agreed upon between client and investigator. There is at this point

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[80] The regulation requires continuation of aid only after a request for a fair hearing has been filed; such a request may not be filed in New York or other states until after final agency action which, in this context, means after aid has been terminated. The state agency will not review a proposed decision to terminate. N. Y. Soc. Serv. L. §353(2); 18 NYCRR §§351.22 & 356.4. Hence, aid will be terminated and in some cases subsequently restored.

simply a controversy or dispute between government investigator and client. The administrative setting and brevity of the hearing itself precludes a prehearing conference or exchange of pleadings between caseworker and client for definition of the issues. The H. E. W. regulation does not require, suggest or contemplate any administrative mechanism to allow clarification and specification of the matters in controversy before a relatively neutral official for application of the limitation.

Rather the regulation contemplates that the question whether determination involves "an issue of fact or of judgment" will be made in the local adjustment process, either by the caseworker with a sufficient conviction to order aid terminated or by an administrator on the basis of the case record prepared by the caseworker. We need not invoke nice notions of impartiality or separations of functions, *cf.*, *Morgan* v. *United States,* 298 U. S. 468 (1936), *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), to recognize that the caseworker whose order to terminate is being appealed is not fairly placed to decide or provide the basis for deciding whether an appeal involves substantial issues of fact or judgment to warrant continuation of aid.

Involving questions of fact or a judgment about an individual is not a self-defining or self-executing standard. It involves the shadowy distinction between questions of fact, mixed questions of fact and law, and "pure" questions of law, and adds to them questions of judgment. No doubt we as lawyers might agree in the application of the standard to the twenty Appellees herein. All of their terminations entailed an issue of fact or judgment about an individual. But the legal sophistication and difficulty of

application is apparent[81] and the materials for our application of the standard to Appellees are affidavits prepared by attorneys and decisions of hearing officers after full elaboration and review. But this critical decision to continue aid is to be made *before* any hearing or federal lawsuit. It is obvious that the administration of this standard will vary among caseworkers and among departments throughout the country. It should also be obvious that the play and action of personal power has not been substantially diminished.

It may be argued in support of this limitation that due process probably does not require prior review where the facts are not in dispute and the decision to terminate is purely legal. But even this much is not established. Although an evidentiary hearing is not required in these circumstances, *cf., Morgan* v. *United States, supra,* it is hardly clear that due process allows *ex parte* administrative action causing grievous injury without some form of

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[81] For example, Alta Gracia Guzman was threatened with termination for refusal to commence a support action against her husband (25a), who was already contributing regular support payments from his limited income (23a). But Department policy does not require that clients participate in groundless lawsuits. Mrs. Guzman thought the suit harassing and the caseworker thought otherwise (24a). In retrospect, it is apparent that there is a substantial question of judgment in the application of policy invoked, but this question would hardly be reflected in the caseworker's view or reports (23a-25a).

Mrs. Guzman's specific transgression was to refuse to sign a document permitting the Department to receive directly the proceeds of a support suit (24a-25a). This document was intended for her benefit; if she had signed, the Department would collect on any support order and her AFDC check would continue in the full amount. By not signing, her AFDC check would be reduced by the anticipated amount of support and she would bear the loss if support was not paid. It is dubious whether any policy supports termination in these circumstances.

review of a challenge to the particular application or existence of a regulation or policy alleged to apply to an individual's situation. *Cf., Londoner* v. *Denver,* 210 U. S. 373 (1908) (where the Court envisioned legal argument on such a case before final action). See also *Yakus* v. *United States,* 321 U. S. 414 (1944); compare *United States* v. *McCrillis,* 200 F. 2d 884 (1st Cir. 1952). The erroneous application of a valid policy or the application of a non-existent one is quite plainly arbitrary administrative action. The risk of error is at least as great, indeed perhaps greater in the welfare context, and the consequences of error are quite the same.

But this nice question need not be resolved, for the situation envisioned in the regulation does not exist at the time of the initial decision to terminate, or afterwards. As we have seen, almost all contested decisions to terminate do entail facts or judgments about an individual. Most of the policies relied on are not crisp rules of law, but evaluative standards themselves entailing judgment. Due process safeguards, and administrative rules too, are formulated for the vast preponderance of cases, not the aberrational situation. The H. E. W. regulation is not.

B. *The H. E. W. Regulation Does Not Afford Any Protection to the Appellees Receiving Benefits Under New York's Home Relief Program.*

An H. E. W. regulation has no legal application to a state financed and governed general relief program, such as New York's Home Relief Program under which six of the Appellees herein were terminated. The State Commissioner has by regulation required prior local review for terminations in the Home Relief Program, under the two options set forth in 18 NYCRR 351.26. Review is now provided in New York City and elsewhere under Option a,

which affords a hearing, since the use of Option b was enjoined below. New York City pursues this appeal, however, to dissolve the preliminary injunction so that it may reimpose the procedures in Option b. The Home Relief recipients' claim against the use of Option b perforce rests solely on the due process clause. This is, therefore, not an academic controversy, nor one affected by the H. E. W. regulation.

It will not do to say that the New York State Commissioner might choose to follow the H. E. W. regulation in the Home Relief Program. The appellant City Administrator, while desiring this result, has no authority to order State review. The State Administrator, who does not appeal from the order below, has required local agency review in Home Relief, and has expressed a decided opposition to the procedures established by the H. E. W. regulation, based on the substantially greater expense resulting from the long delays inherent in the state hearing process. App. B. Further, there is a long tradition of differences in the administration of Home Relief and the federal programs. Many of the basic federal requirements and safeguards have not been applied in Home Relief. Indeed, the statutory hearing before the state agency, available since 1935 in AFDC, was extended to recipients of Home Relief in January 1968, at the initiation of this lawsuit. Local agencies, bearing a larger share of the financing, have played a considerably greater role in the administration of Home Relief. Both this tradition and the additional costs of utilizing the formal state machinery persuasively argue against voluntary adoption of the H. E. W. procedure in preference to §351.26(a) in the Home Relief program.

V.

The plea for administrative flexibility is both untimely and irrelevant to constitutional resolution of the due process rights of welfare recipients.

The unfortunate history of public assistance administration since the Social Security Act of 1935 is no longer an invisible part of our legal system. After three decades of federal and state inaction and failure to administer welfare benefits in a manner commensurate with the vital interests of individuals and families statutorily entitled to receive them, the plea today for flexibility, experimentation, and its upshot, immunity from the basic prerequisites of due process, is singularly inappropriate.

There are some who believe our traditional legal institutions and precepts of fairness cannot respond to the needs of the poor and disadvantaged. There may be some truth in this. Due process of law is not a panacea to the problems inherent in our ossified and bureaucratic system of public assistance administration. Errors will continue apace and process will not rectify all of them. But until legislative or administrative ingenuity creates something better, the time-honored procedures afforded by reflex to our more advantaged citizens in dealing with the government can no longer be denied to the poor. Appellees are not asking for any special or novel constitutional rule because of their circumstances. They seek only traditional constitutional safegards, safeguards which themselves embody the government's respect for the elementary rights of individuals.

The plea for administrative flexibility is also irrelevant. This Court is not asked to prescribe an administrative code

of procedure for welfare termination proceedings; nor is it asked to specify the atypical instances where a hearing might not be required. The Court is asked to affirm the minimal safeguards formulated and applied by the court below. That court did not deal with the details of implementation or procedural minutiae below the threshold of constitutional concern. It applied minimal safeguards in response to the evils and abuses in the prevailing system of welfare administration, as documented in the record of this case, and in the absence of alternatives which effectively control these evils. These minimal safeguards do not impose rigidities or prevent administrative flexibility to deal with problems, if and when they arise. And even this much is not permanent. Where a procedure is Constitutionally required, it may cease to be so if and when suitable and adequate alternatives are developed or other measures have eliminated the evils at which the rule is aimed. Constitutional holdings in procedural matters are not immutable. Compare, *Wolfe* v. *Colorado,* 338 U. S. 25 (1949) with *Mapp* v. *Ohio,* 367 U. S. 643 (1961). See *Miranda* v. *Arizona,* 384 U. S. 436, 467, 490 (1966); *U. S.* v. *Wade,* 388 U. S. 218 (1967); *Gilbert* v. *California,* 388 U. S. 263, 273 (1967). Nor do they preclude alternative adequate protection by Congress, the state, or H. E. W. See, *Miranda* v. *Arizona, supra.* Affording welfare recipients procedural due process of law "in no way creates a Constitutional straitjacket." *Miranda* v. *Arizona, supra,* at 467.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

Statements of Fact for Individual Plaintiffs (in Alphabetical Order)

Mrs. Alma Coldburn

Mrs. Alma Coldburn was a recipient of Aid to Families with Dependent Children (hereafter AFDC) for herself and her son until aid was suspended by notice dated February 21, 1969. The stated reasons for termination were that she owned a car, that she was living with a man, and that she had a bank account which she had failed to report (175a).

In fact, Mrs. Coldburn has been recuperating from a major operation since the Fall of 1967, and has suffered further illnesses. She needs the car to visit doctors at least once every week and to make trips to hospitals, often for emergency treatment at night, several times a month. The man whom the Department accused of living with her had merely driven her to the hospital when she was very ill. She had not reported the bank account because it contained less than five dollars (175a).

A State hearing was scheduled and adjourned on March 28, April 15, and April 30, 1969. On May 27 the hearing was resumed and finally completed (176a). As of July 5, 1968, a full four months after Mrs. Coldburn was suspended, no decision had been rendered (329a). Mrs. Coldburn has frequently reapplied for aid and has been told that her case has only been suspended and that therefore she could not reapply.

MR. JUAN DE JESUS

Juan De Jesus was terminated from Home Relief without notice. When he called his caseworker, he was advised that the termination resulted from his failure to produce a previous employer in person to verify his part time employment, and also because he drank and took drugs. Mr. De Jesus had previously presented written verification of his past employment, and his employer had moved out of the city. He neither drinks nor takes drugs (17a). Mr. De Jesus' attorney was unable to obtain his restoration to the rolls until after the filing of this lawsuit, whereupon aid was immediately reinstated (106a).

MR. JOHN KELLY

John Kelly received Home Relief because of serious disability caused by an automobile accident. On December 16, 1967, he was ordered by his caseworker to move to a new place of residence. He complied with the caseworker's order, but then left the new hotel because it was inhabited by drug addicts and drunkards. His assistance was terminated without notice in early January, 1968, and he did not receive his regular maintenance check nor his special grant for a winter overcoat (14a). When he attempted to contact his caseworker at the Grammercy Welfare Center he was refused an interview and informed that his case had been terminated because "he had violated his caseworker's instruction to move into the Barbara Hotel and remain there or suffer immediate termination . . ." (15a). In its papers the City claimed that the case was closed because he had disappeared (105a). In fact, John Kelly and a social worker from Mobilization for Youth made repeated attempts to reopen his case (14a). The termination of his

case left John Kelly destitute, and MFY provided him with a loan. Only after this action was commenced did the City resume assistance payments (106a).

Mrs. Pearl Frye

In the middle of December 1967, Mrs. Pearl Frye and her eight children were "technically suspended" from AFDC for failing to keep two appointments at the Central Office's Resources Department (38a). The appointment was to enable Mrs. Frye to explain the ownership of the house in which she was living rent-free. In fact, the house was provided by the father of some of Mrs. Frye's children, and she had no financial interest in it whatsoever (20a). After suspension, Mrs. Frye's caseworker told her that if the father met with welfare officials, aid would be restored. Despite her compliance with this request, her assistance was not reinstated (21a). By January 1968 Mrs. Frye had exhausted her meager funds originally budgeted for winter clothing and badly needed furniture in supplying food for herself and her children. With the aid of an independent social worker she attempted to obtain emergency assistance, but was told that such assistance was not available to cases under "technical suspension" (38a). In fact, the only private assistance Mrs. Frye received was surplus commodities given by neighbors who were themselves welfare recipients. During the time of her suspension, Mrs. Frye's already poor health deteriorated, and she received hospital care for an infection and stomach disorders. Despite the active intervention of her attorney, only minimal emergency grants were provided until after the filing of this lawsuit.

Mrs. Maria Fuentes

On March 5, 1968, Mrs. Maria Fuentes received a notice of discontinuance of AFDC assistance for herself and four children. Aid was terminated because "You have a large sum of money in the bank for which you were unable to give a satisfactory explanation" (210a). In fact the money was not hers, but belonged to her grown daughter and son. The welfare center did not give Mrs. Fuentes an opportunity to explain the ownership of the funds prior to termination. When advised by Mrs. Fuentes' attorney that New York State procedures required some form of prior hearing, the welfare center administrator replied that the New York State regulations were "not being implemented here yet" (178a). Despite numerous conversations and agreements between her attorney and high welfare department officials, Mrs. Fuentes was kept on minimal emergency rations of $1 per day per person, and never restored to the full amount to which she was entitled.

A fair hearing was held on March 29, 1968, and Commissioner Wyman handed down a decision on April 30: because Mrs. Fuentes was still receiving some public assistance, there was no issue to be reviewed at a Fair Hearing (180a). Mrs. Fuentes is therefore in continual threat of termination without an opportunity to explain the ownership of the funds in question.

Mrs. Cynthia Fuller

Mrs. Cynthia Fuller's AFDC grant for herself, her husband, and her six children was reduced by notice dated December 11, 1967, on the ground that rent would not be paid until the Department had clarified facts about the ownership of the house in which the family lived. On De-

cember 18 she requested a fair hearing to challenge the reduction. On December 26 Mrs. Fuller received a notice that her grant was suspended for "failure to accept job offered by our employment division" and "failure to keep appointment at our office" (202a). On December 28 she asked that the issue of suspension be added to the fair hearing which she had already requested to challenge the reduction. Assistance was completely terminated by a third notice dated December 28 for "refusal to accept employment offered by our employment division" (204a).

A fair hearing was originally scheduled for January 23, 1968, but was adjourned until February 13. After some testimony was taken on that date, the hearing was adjourned to give the City time to prepare cross-examination (173a). A third session was set for March 15, at which time the City requested a further adjournment because of delays in preparing the transcript of the previous session. The adjournment was granted over objections by Mrs. Fuller and her attorney.

A fourth session was scheduled for April 9, but was never held due to the funeral of Rev. Martin Luther King. The hearing was rescheduled for April 15, without notice to Mrs. Fuller's counsel. On that date the City cross-examined Mr. Butler, a witness for Mrs. Fuller, for three hours, and the hearing was again adjourned without date at 5:00 P.M. over strenuous objections. At the fifth session on May 2, the cross-examination of Mr. Butler continued for one and one-half hours despite repeated objections by Mrs. Fuller's counsel that the witness was being harassed (174a). No opportunity for re-direct examination was allowed because the hearing was again adjourned at noon. The hearing was finally completed on May 28, the City having never produced a witness for whom repeated adjournments had

been allowed (174a). Mrs. Fuller re-applied for aid in February 1968. By notice dated February 23, 1968, Mrs. Fuller was denied assistance on a new ground, that of inability to ascertain family income (175a).

MR. AND MRS. FELIX GOMEZ

Mr. and Mrs. Felix Gomez were the recipients of AFDC for themselves and their four children (187a and 188a). On April 12, 1968, Mrs. Gomez received a notice of discontinuance on the grounds of "return of husband to home and he is working" (220a). The discontinuance was effective immediately. Mr. Gomez requested a fair hearing on April 17, 1968. Mr. Gomez's attorney spoke with his caseworker and supervisor concerning Mr. Gomez's case. Over the course of one month the department produced a variety of unrelated reasons for the termination: that Mr. Gomez was in debt to his caseworker; that he had concealed his presence in the country; and that he had requested his case to be closed (188a). On May 23, 1968, once the fair hearing had begun, the Department immediately changed its story, "withdrew" the termination of Mr. Gomez's case, and agreed to restore fully his public assistance grant (189a). Aid was not provided, however, and on June 10, 1968, Mr. Gomez's attorney called both the caseworker and the supervisor. The attorney was told that Mrs. Gomez, who had left the house, had presented the Department with a receipt for a $200 gold watch which she alleged Mr. Gomez had bought for his girlfriend. After some discussion the supervisor agreed with the attorney that the purchase was most unlikely because Mr. Gomez had only received $51 from mid-April until June, and since May 8, when his wife left, he had been responsible for caring for

his four children and had been unable to work (190a). The supervisor promised to restore Mr. Gomez's grant for June 1968, but when Mr. Gomez went to the welfare center on June 12, 1968, he was again refused.

Mrs. Altagrazia Guzman

Altagrazia Guzman, having received AFDC for herself and her four children for more than a year, was advised repeatedly that unless she filed or consented to a support action against her husband, aid would be terminated (24a). She refused to do this because she believed that her husband was already supplying her with support and aid in excess of the amount the court would order (23a). Her attorney advised her that under the law of the state, the action could be filed by the department as plaintiff without her consent (24a). On three separate occasions supervisors in the department advised Mrs. Guzman's attorney that aid would be terminated about February 1 if the consent paper was not filed. Her intervention occurred on June 26, 1968, and aid was not terminated (102a).

Mrs. Mary Holmes

Mrs. Mary Holmes was a recipient of AFDC for herself and her two children until June 3, 1968, when her assistance was terminated (193a). Mrs. Holmes had been provided money for a deposit on a new apartment. When the apartment became unavailable, she informed the caseworker that she had spent part of the money on a new bed, since her four year old child had previously slept with her and was always wetting the bed. She said that she would use the rest of the money for a deposit on another apartment. Due to incorrect addressing by the Department,

Mrs. Holmes never received the letter from her caseworker informing her that she had been rude to the worker and that unless she immediately produced a receipt for expenditures her assistance would be terminated (192a and 230a). On May 29, 1968 Mrs. Holmes received a notice of intent to suspend her grant which explained that she was to be suspended for the following reasons: "failure to explain management in regard to grant issued on 5/15/68, and failure to comply with policy in regard to explanation of management" (234a). On or about June 6, Mrs. Holmes received a notice of discontinuance dated June 3, which informed her of her ineligibility for the same reasons given in the notice of intention to suspend her grant (234a). Mrs. Holmes had not previously requested a review in response to the notice of suspension of grant because she did not understand the consequences of this notice (195a). After intervention of a local welfare rights organization, Mrs. Holmes received an emergency grant on June 18, 1968 and on July 1, 1968 she was restored to the rolls (325a).

MRS. ESTHER LETT

Mrs. Esther Lett received AFDC for herself and four nieces and nephews until Feb. 1, 1968. On Feb. 11 she received a notice of discontinuance for "failure to disclose assets" (71a). The specific basis of termination was a letter from the Board of Education, in response to an apparently routine inquiry from the welfare department, to the effect that Mrs. Lett was currently employed by them (79a). This letter was completely erroneous; Mrs. Lett had been employed in the Head Start program in the summer of 1967 and occasionally as a substitute teacher during the Fall, but had no further or regular employment. The

department had been made fully aware of Mrs. Lett's previous employment through her caseworkers and as the result of a previous fair hearing, seven months before, at which the State held that Mrs. Lett had been wrongfully terminated (71a). Mrs. Lett's attorney requested a fair hearing on Feb. 19. There was still no reply when, on Feb. 22, Mrs. Lett, explaining that she was starving, attempted to obtain emergency assistance at the emergency welfare center. She was denied aid on the grounds that she had concealed assets (72a). Her attorney lent her money so that she might immediately obtain a meal, and the Legal Aid Society provided more so that her children would have food for the weekend (84a). The attorney called the caseworker for a second time and sought to inspect the letter from the Board of Education. He then went personally to the office of the Board of Education and verified the mistake (79a). When the attorney called the supervisor at the welfare department to advise her of the mistake, the supervisor stated that the records had been transferred and hung up (85a). On Feb. 27 Mrs. Lett and her attorney then went to the center to which the records had been transferred for emergency aid; the attorney left only when he was assured that the case would be taken care of (85a). Mrs. Lett waited all day and fainted during the afternoon because of lack of food (93a). When she was revived she was told that aid would not yet be forthcoming since it had not been authorized. At 5:00 she was given $15 and was told to return three days later (79a). During this period Mrs. Lett and the children depended on the charity of her neighbors, who are welfare recipients (72a). At one point during this harrowing experience, they were all forced to go to Harlem Hospital for treatment of severe stomach

disorders resulting from spoiled chicken and rice donated by a neighbor (72a). Aid was reinstated after the filing of this lawsuit (249a).

MRS. PEARL MCKINNEY

Mrs. McKinney received an AFDC grant for herself and four of her five children. In November-December, 1967, her caseworker requested information concerning her eldest son's earnings. The son visited the caseworker (18a) and Mrs. McKinney's attorney sent a certified letter (receipt acknowledged) advising the caseworker of the amount of the son's earnings, that the son had not contributed anything to the household and was not a legally responsible relative, and that the son was saving up to be married (33a, 36a). A week after this letter was sent, Mrs. McKinney received notice that her AFDC grant had been suspended for "failure to get to us information concerning your son's employment" (34a). Despite his efforts, her attorney was unable to have her family restored to the rolls until after the filing of this action (53a, 248a).

MRS. MAGDALENA MULEI

Mrs. Magdalena Mulei's AFDC grant for herself and her two children was suspended on March 16, 1968, on the ground that her new husband was able to provide for the children (176a). In order that the family would not be subjected to severe injury the City Department reinstated assistance to the Mulei family pending a fair hearing decision regarding Mr. Mulei's liability to support the children (177a). On April 18 Defendant Wyman refused to reach a decision on the merits since "a fair hearing prior to discontinuance" is "neither authorized nor provided for by

the relevant statutes and regulations" (206a). In compliance with a new termination procedures, the City notified Mrs. Mulei on or about June 1, of their intention to discontinue assistance on June 4, 1968; "since the contribution of Mr. Juarez in addition to the monies earned by Mr. Mulei is more than sufficient to meet the children's needs" (177a, 208a). Thereafter assistance was discontinued. A fair hearing was scheduled for July 29, 1968 (329a).

Mrs. Theresa Negron

Mrs. Theresa Negron received AFDC for herself and her five children to supplement her salary as superintendent of her building. She advised her caseworker that she would be out of town to visit a friend in Philadelphia. Nonetheless, the caseworker wrote to her during her absence asking her to come in for an interview and, when the appointment was not kept, suspended aid without any notification whatsoever. When Mrs. Negron did not receive her check, she twice tried to contact the caseworker by telephone but the calls were never returned. She kept a June 6, 1968 appointment with another employee of the department and was advised that the department believed that Mrs. Negron's husband was visiting her. This was denied by Mrs. Negron (169a-170a). Four days later Mrs. Negron went to a local welfare rights organization which telephoned the department on her behalf. An employee stated that the reason for termination was that Mrs. Negron was living with her husband. This employee then consulted the case record and found that the reason stated was that Mrs. Negron was living in Philadelphia (200a). Mrs. Negron was reinstated to full assistance only after her complaint had been filed in this action on June 17 (327a, 166a).

Mr. Leroy Pavey

Leroy Pavey is 63 years old and was a recipient of HR until Jan. 15, 1968. Sometime before Jan. 15, Mr. Pavey took up temporary residence in the Bowery Mission. He did not receive his Jan. 15 check, and no notice of termination whatever was supplied (190a, 191a). Mr. Pavey requested a fair hearing which was conducted and concluded on March 25, 1968. As of July 5, a full six months after termination, no decision had been rendered (329a). During this period Mr. Pavey suffered two severe illnesses, and had part of his left leg amputated (190-191a).

Mrs. Minerva Rodriguez

Mrs. Minerva Rodriguez and her four small children were terminated from AFDC public assistance on May 27, 1968, without notice (330a). She was told by her caseworker that she would have to reapply to receive further aid (188a). The caseworker had made two unannounced visits to Mrs. Rodriguez' apartment in May. She was not home for the first visit. Her children were at home with a babysitter at the time of the second, unannounced visit. The babysitter spoke English very poorly. When the caseworker was telephoned by a community action employee, he stated that the case was closed because he thought that the babysitter had informed him that Mrs. Rodriguez no longer lived in the apartment.

Mrs. Ruby Sheafe

Ruby Sheafe was a recipient of Home Relief from September, 1966 to January 8, 1968. On that date Mrs. Sheafe visited her caseworker and was ordered to produce the name and address of a former employer (prior to Sep-

tember, 1966) whom the caseworker wished to contact. The caseworker refused to explain why this information was required. Ruby Sheafe informed the caseworker that she was quite willing to have the Department contact her present employer, but she refused to give the name of her former employer of more than a year ago without an explanation of why this information was necessary (70a). The worker then told Mrs. Sheafe that her case was "closed" (70a).

Ruby Sheafe did not receive her check due January 16, 1968, and on January 17, received a notice of discontinuance stating that her case was closed for "refusal to permit visits (collateral)" (70a). On January 26, she requested a fair hearing but none was scheduled. On February 19 her attorney was informed that since Mrs. Sheafe was receiving Home Relief, she had no statutory right to a fair hearing (96a). Despite her attorney's persistent efforts to obtain a decision on the case from department officials, no action was taken, and Ruby Sheafe managed to survive only on the charity of her landlord, the Y. W. C. A., who allowed rent bills to accumulate, and on small loans from Mobilization for Youth (97a). Assistance was not reinstated for almost four months after cutoff, when the State ruled in a fair hearing that the termination had been totally without foundation and contrary to explicit State regulations, which require the Department to inform a recipient of the purpose of a collateral investigation (298a).

Mrs. Ina Sidor

Mrs. Ina Sidor and her child were suspended from AFDC on August 16, 1967 because of "failure to comply with the department's resource policy" (182a). The de-

partment claimed that she owned stock and objected to her ownership of a car, paid for by her mother, to transport the child to a special school for deaf children. A fair hearing decision was finally rendered on March 7, 1968, a full six months after Mrs. Sidor had requested the hearing (216a). The Commissioner held that the suspension of Mrs. Sidor's grant of public assistance from August 16, 1967 to October 16, 1967, had been without foundation and contravened State regulations regarding resources. Meanwhile, on February 16, 1968, assistance to Mrs. Sidor was suspended again, for the same reasons under review in the pending hearing (183a). A hearing was held on March 28, 1968. The decision, rendered June 27, 1968, and sustaining the suspension, was annulled by the Appellate Division, Second Department, on July 11, 1969 for failure to make any findings which could be reviewed. *Matter of Sidor* v. *Department of Social Services,* N. Y. L. J., July 11, 1969, p. 11, col. 5 (App. Div. 2d Dept.).

MR. ANTONIO SOTO

On May 28, 1968, Mr. Antonio Soto received a "Notice of Intent to Discontinue Public Assistance" under "Option b" of the New York State prior hearing system. The notice stated that Home Relief was to be discontinued for "Failure to attend rehabilitation C. O. C." Mr. Soto's attorney contacted the welfare center and in his letter of June 5, 1968, responded to the Department's charges and indicated his client's willingness to cooperate with the Department's treatment and job-training policy. On June 11 Antonio Soto received a notice of discontinuance based on the same reasons set out in the previous notice (192a).

The discontinuance of Mr. Soto's grant was based on a decision by a review officer which, contrary to usual practice, was made available to Mr. Soto. The decision relied entirely on hearsay statements by unidentified workers to the effect that Mr. Soto was a "parasite" and that he was "playing a game" (192a). A fair hearing was requested, and after filing of this lawsuit Antonio Soto's case was reopened and assistance was resumed (325a).

MRS. ANGELINA VELEZ

Mrs. Angelina Velez has relied on the New York City Department of Social Services for support of herself and her four children (AFDC) since early 1964, a few months after she was separated from her husband, Sergie Velez. In early March, 1968, Mrs. Velez took the opportunity of a caseworker's visit to her home to request some needed items of furniture and coats for her children. The caseworker told Mrs. Velez that she could not get the requested items, saying: "You people think welfare has got to give you for everything." Mrs. Velez defended herself, answering, "You come here to see my needs and are not doing it. If you are not here to see my needs, what are you doing here? Get out." The caseworker's reply was "You cannot talk to me that way. I can close your case" (185a and 186a).

A few days thereafter, on March 11, 1968, Mrs. Velez received a notice of suspension of assistance because, the Department alleged, Mr. Velez was living in the household. The Department did not appear for a fair hearing scheduled for April 18, 1968. On June 6, 1968 the hearing was reopened, adjourned at 5:00 P.M. and rescheduled for June 17.

In the interim Mrs. Velez had tried to help her family by contacting the Legal Aid Society to aid her in dealing

with the Department, and by taking Mr. Velez to Family Court where he agreed to increase his $20 per week contribution to $30 per week. After a near eviction in April, when the Department, prodded by the intervention of a Legal Aid attorney, finally issued emergency funds for rent, Mrs. Velez and her four children were indeed evicted from their home in May. They moved in with Mrs. Velez's sister, herself a recipient of public assistance, and her nine children. Mrs. Velez and three of her children shared "two single beds in one small room," while the fourth child slept in a crib in the same room (341a). The family frequently ate only two meals a day. Inadequate diet and cramped conditions resulted in physical harm and emotional strain. Mrs. Velez was denied emergency assistance at least three times following her termination (349a).

At the hearing on June 6, the caseworker testified that Mrs. Velez's grant had been suspended on the basis of one conversation with Mrs. Velez's landlady during which the landlady had alleged that Mr. Velez was living in the household, an allegation which the Department confirmed to its satisfaction by obtaining a post office clearance which indicated that Mr. Velez received mail at the family address.

On July 10, 1968, four months after termination, Defendant Wyman, in his fair hearing decision (362a-364a), held that Mrs. Velez's husband did not live with her; that, in fact, in 1966 Mrs. Velez had obtained a Family Court Order of Protection enjoining Mr. Velez from making night time visits; that Mr. Velez regularly visited his family to deliver his support payments and to see his children; and that there was no evidence to suggest that Mr. Velez was contributing more than the acknowledged $30 per week to the family's support.

Mr. Randolph Young

Randolph Young, a 40 year old recipient of Home Relief, has received aid intermittently for the past ten years, a period which has been marked for Mr. Young by poor health and frequent hospitalizations. On January 12, 1968 Mr. Young was informed in a telephone conversation with his caseworker that his case had been closed for mismanagement of funds—presumably referring to the $20 for food and shelter of which Mr. Young had been robbed and the $5 employment agency fee which the Department had advanced to pay for a job which Mr. Young was unable to retain because of the heavy labor it involved (15a-16a).

After his termination, Mr. Young borrowed some money from Mobilization for Youth (43a) and, for the rest, lived on what he could borrow from friends. Shortly after the commencement of this lawsuit, plaintiff Young was hospitalized and therefore rendered temporarily ineligible for aid (105a).

APPENDIX B

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
112 STATE STREET
ALBANY, NEW YORK 12201
TELEPHONE—AREA CODE 518-474-2121

GEORGE K. WYMAN
COMMISSIONER

ADMINISTRATIVE LETTER

TRANSMITTAL NO.: 69 PWD-14
DATE: February 14, 1969

To: Commissioners of Social Services

SUBJECT: 1. Review by a Local Agency before Discontinuance or Suspension of Grant
2. Kelly v. Wyman; Regulation 351.26

DISTRIBUTION: B-2 General Administrative Staff

1. On November 26, 1968, a three judge federal district court rendered a decision in the case of *Kelly, et al.* v. *Wyman, et al.* (S. D. N. Y. 68 Civ. 394) with significant consequences for all federal categories of public assistance and home relief. A summary of this decision follows.

In issue was the constitutional adequacy of the local agency review procedure required under the provisions of Section 351.26 of the State Regulations to be used in cases of proposed discontinuance or suspension of grants. It was

the position of the plaintiffs that they were constitutionally entitled to a full fair hearing before the state prior to the discontinuance of assistance.

Section 351.26 of the Regulations was promulgated by my order after the suit was instituted in order to provide for advance notice to a recipient of a proposed termination of assistance with the offer of an opportunity for an informal conference before local agency supervisory personnel. At this time the recipient or his representative, if any, would be apprised of the reasons for the proposed discontinuance and of the evidence upon which such intended action is based, coupled with an opportunity for the recipient to present his own evidence and arguments in opposition to the intended action. However, soon after its promulgation, on the request of the New York City Department of Social Services, Section 351.26 was amended to provide for an alternate local review (Paragraph b) whereby the recipient was given an opportunity to submit his arguments and evidence in writing, in lieu of an opportunity for a personal appearance at a scheduled conference. This alternate review was declared to be constitutionally inadequate in *Kelly* v. *Wyman*. However, the review procedure under Section 351.26 (a) of the Regulations, which does provide for an informal conference at which the recipient and his representative, if any, may appear, was held to be constitutionally adequate for the protection of the recipients' rights. The City of New York has filed an appeal from the decision with the United States Supreme Court. However, pending the determination of such appeal or until further notice, the Court's decision remains in effect. Accordingly, the local review procedure required under Section 351.26 of the Regulations is limited only to the procedure specified under paragraph (a) thereof.

The alternate procedure under paragraph (b) is no longer permitted.

2. On November 30, 1968, the Department of Health, Education and Welfare published in the Federal Register, a proposed Regulation that would provide, in part, as follows:

"When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached". In effect, the proposed Regulations will require a fair hearing prior to termination or reduction of assistance. The Department has filed objection to the proposed Regulations for the following reasons:

a) The proposed Federal Regulation would be contrary to those parts of Titles I, IV, X, XVI, and XIX of the Social Security Act which offer to the state the option of administering the programs covered by each of those titles or assigning the administrative responsibility to local agencies. In those states, as New York, which have chosen the option of state-supervised and locally-administered system, the intent of Congress and of the State Legislature would be nullified by the proposed Federal Regulation.

b) Federal Courts have held in at least two cases (*Kelly* v. *Wyman* and *Wheeler* v. *Montgomery*) in which the two largest states are parties, that it is unnecessary for the protection of the rights of recipients that there be offered, and held if requested, a fair hearing be-

fore the state-supervisory agency prior to the termination of assistance by the local administering agency, provided there is in effect a state Regulation which mandates a local review procedure allowing personal participation by the recipients who would be affected and which otherwise meets the constitutional tests of due process. Section 351.26(a) of the Regulations of the New York State Department of Social Services has been found by the Federal Courts to meet this test, in the *Wyman* case. A similar California regulation has been found to meet the same test, in the *Montgomery* case.

c) Our experience indicates that in a state-supervised locally-administered system, a pre-termination local review procedure which meets the tests of due process as required under the provisions of Section 351.26 (a) of the Regulations of the New York State Department of Social Services is a more effective and expeditious method of preventing error than the fair hearing procedure since such local review can be completed within a period of no more than two weeks, whereas the fair hearing method takes substantially more time.

d) In a state-supervised locally-administered system it is preferable for the local administering agency to be afforded an opportunity by means of a state mandated local pre-termination review procedure, which meets the tests of due process, to correct its own errors before they are made, thereby restoring and strengthening the recipient's confidence in the local administering agency.

/s/ GEORGE K. WYMAN
Commissioner

APPENDIX C

XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

C. Closing Reasons and Codes.

The closing reasons and their corresponding codes are divided into three groups: (1) death, (2) lack of eligibility with respect to need (because of increased resources or decreased need), and (3) lack of eligibility for reasons not related to need (involving no known change of economic circumstances). The Investigator shall select that reason which had the greatest effect in causing the case to be closed or reclassified. When two reasons occur simultaneously, one of which involves ineligibility with respect to need and the other involves ineligibility without respect to need, the Investigator shall select the one which reflects ineligibility with respect to need.

1. Death.

Code	Applicable Types of Assistance	Reason
*01	All	Death of only dependent child (ADC and T-AD cases) or of recipient (in other than ADC and T-ADC cases). Specify date of death. (Wh ADC or T-ADC case is closed because of dea of the only eligible relative, use Code 0

2. No Longer Eligible with Respect to Need.

(Change in Economic Circumstances)

a. Change in Employment, Income, Support or Other Resources.

(1) Employment or Increased Earnings of Person in Home.

*02	ADC	Employment or increased earnings of father residing in home as part of family unit, though not necessarily part of the case. Includes stepfather, natural or adoptive f
*03	ADC	Employment or increased earnings of mother residing in the home as part of the family unit, though not necessarily part of the c
*04	All (except ADC and T-ADC)	Employment or increased earnings of recipi (in HR and VA cases, the case head).
*05	All	Employment or increased earnings of other person in the home. For dependent child in ADC or T-ADC case, use Code 06.
*06	ADC and T-ADC	Employment or increased earnings of depen child (includes military allotment from D earnings of DC placed in foster family ho for work or wage).

*Closing Reason Code requiring special case closing entry for AB, AD, ADC, T-ADC or OAA case.

XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Code	Applicable Types of Assistance	Reason
*07	All (except ADC and T-ADC)	Employment or increased earnings of spouse residing in the home as part of family unit. In HR or VA cases, the spouse of the case head.
*08(*09)**	T-ADC	Parent returned to former employment.
*10(*11)**	T-ADC	Parent obtained employment through NYSES referral.
*12(*13)**	T-ADC	Parent obtained employment through a source other than NYSES referral.

**Codes in parentheses are to be used when the parent, who was employed part-time, returned to full employment.

(2) Support from Person in Home.

*14	ADC	Absent parent's return. Support assumed or increased at time of or after return. Specify date of return. If support was given before return, use Code 16. If need still exists and the case is reclassified to another type of assistance, use Code 44.
*15	ADC	Remarriage of parent or marriage of unmarried mother. Support assumed or increased at time of or after marriage. Specify date of marriage. If need still exists and case is reclassified to another type of assistance, use Code 45.

(3) Support from Person Outside of Home.

*16	ADC	Receipt or increase in support by father, absent from home (at time of closing).
*17	All	Receipt or increase in support by other person outside of home. (Care assumed by or increased support from relatives or friends.)

(4) Benefits, Pensions and Other Resources.

One of the Codes 18 to 21 is used whenever a case is closed because of the receipt of or an increase in a government benefit, whether in an individual situation or as a result of a liberalization of benefits due to a revision of the law.

*18	All	Receipt of or increase in Unemployment Insurance Benefits by person in home.
*19	All	Receipt of or increase in OASDI benefits by person in home.

*Closing Reason Code requiring special case closing entry for AB, AD, ADC, T-ADC, OAA.

XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Code	Applicable Types of Assistance	Reason
*20	All	Receipt of or increase in Federal benefits or pensions by person in home. Specify. (Includes benefits connected with military service such as pensions, life insurance, educational benefits; military allotment, from person other than a dependent child. for a DC, use Code 06.)
*21	All	Receipt of or increase in benefits or pensions under State or local program other than OAI, by person in home. Specify. (Includes Workmen's Compensation, New York State Disability Benefits, State or local Civil Service, Teachers' retirement pensions, etc.)
*22	All	Receipt of or increase in benefits or pensions under a non-governmental program by person in home. (Includes pensions from labor union,
*23	All	Other material change in income or resources of person in home. Specify. (Includes any income or resources not specified under Code to 22. Examples: Receipt of life insurance benefits other than military-connected life insurance, inheritance of money or property, income from boarder or lodger, support by a person in home other than ADC parent.)
24	All	Client's request. (Reason for request is not known.)
	b. No Change in Income or Resources	
	(1) Decreased Need.	
25	All	Decreased need for medical care. (Includes termination of medical, nursing home or remedial care provided by the Department, or the expiration of a therapeutic diet which eliminates the budget deficit.)
26	All	Decreased need for items other than medical care. (Includes decrease in rent, termination of a special budgetary item other than a therapeutic diet, etc.)
	(2) Change in State Law or Department Policy.	
27	All	Change in State law or Department policy relating to determination of need. Specify change in law or policy. (Example: Deletion or reduction in allowance schedules, etc. case is closed because of liberalization of benefits due to a change in State or Federa use Codes 18 to 21.)

*Closing Reason Code requiring special case closing entry for AB, AD, ADC, T-ADC, or OAA case.

XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Code	Applicable Types of Assistance	Reason
	3. Ineligibility for Reasons Other than Need.	
	(No Change in Economic Circumstances)	
	Codes 30 and 31 are to be used for all regular grant cases (except HR, VA and preinvestigation grants) only where the factor which rendered the case ineligible for the particular type of assistance existed at the time the case was last accepted.	
	a. Subsequently Ineligible.	
*30	All (except HR, VA and preinvestigation grant cases)	Eligibility, apparently established by adequate investigation, subsequently disproved. (Cases closed as a result of information which was unavailable to the Department when case was last accepted and which, if known at that time, would have rendered the case ineligible for the particular type of assistance.)
	b. Originally Ineligible.	
*31	All (except HR, VA and preinvestigation grant cases)	Eligibility never established. (Cases which, in the absence of adequate investigation or appropriate action, are known or conceded to have been ineligible for all grants for the particular type of assistance since date of last acceptance.)
	c. Other Change in Situation Causing Ineligibility.	
*40	AB, ADC, AD	No longer incapacitated. (Applies if the recipient or ADC parent no longer meets the established definition of blindness (AB), permanent or total disability (AD), or inability to provide parental support or care (ADC), and if the case is reclassified to another type of assistance because need still continues. If need terminates because the change is accompanied by employment or increased earnings, use Codes 02, 03 or 04.)
*41	ADC and T-ADC	Last or only dependent child reached 18th birthday and not regularly attending high school, community college or course of vocational or technical training, or over 18 years and discontinued attending such school, college or course, or over 18 years and graduated from such school, college or completed such course.
*44	ADC	Absent parent returned. Specify date of return. (Applicable only if need continues and case is reclassified.)
*45	ADC	Parent married or remarried. Specify date of marriage. (Applicable only if need continues and case is reclassified.)

*Closing Reason Code requiring special case closing entry for AB, AD, ADC, T-ADC or OAA case.

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XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Code	Applicable Types of Assistance	Reason
46	ADC and T-ADC	No eligible payee. (Death or depar of the only available relative eligi to receive the grant. Includes cas where the eligible relative was hospitalized and it is necessary to the case.)
*47	ADC and T-ADC	Last or only dependent child left h case. Specify date of leaving. (I cases where the child was hospitali it is necessary to close the case.)

d. Refusal to Comply with Departmental Policy.

The following codes are used when the recipient does not comply with Departmental policy or regulations or when he withholds or refuses to reveal information which may affect his eligibility for public assista

When the information withheld is obtained through other sources and th case is closed as a result, the code which reflects the actual closing reason shall be used. If the information withheld in the Federal cate (all except HR) concerned assets or income which existed when the case last accepted for one of these types of assistance, use Code 30 or 31.

48	T-ADC	Refused to accept NYSES referral employment.
49	T-ADC	Refused to accept employment thro a source other than NYSES referra
50	All (except T-ADC)	Refused to seek or accept employ
53	All	Refused to comply with Departmen resource policy.
54	All	Refused to permit collateral visi
55	All	Refused to explain management.
56	All	Misuse of funds.
57	All	Refused to keep medical, placeme other appointment.
58	All	Other refusal to comply with Dep policy. Specify.
59	ADC, HR, VA	Would not agree to notification enforcement official. (Applies VA cases in which the client is for ADC or to ADC cases, in whic are deserted or abandoned and cl withdrew the request for assista preference to having notificatio the law enforcement official.)

*Closing Reason Code requiring special case closing entry for AB, AD, ADC, T-ADC or G

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XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Applicable Types of Assistance	Reason

e. Other Assistance.

Current policy provides, within certain limitations, for the suspension of recurring assistance to hospitalized clients (except MA), while permitting the case to remain statistically under care. Consequently, the case of a hospitalized client is not to be closed except in the following situations:

(1) Hospitalization is for tuberculosis or mental disease (all types of assistance except that AB, AD, MAA, or OAA may be granted in a general or chronic disease hospital for a maximum period of 42 days after a diagnosis of TB or psychosis). Includes hospitalization in a ward or part of a general or other hospital or mental facility used exclusively or primarily for the care of persons suffering from tuberculosis or mental diseases; or in any hospital or mental facility as the result of a diagnosis of psychosis or tuberculosis (including tuberculosis of the bones or joints), or because the client is a tuberculosis suspect.

(2) The recipient has been receiving Home Relief or Veteran Assistance (local charge only) for less than 30 days prior to hospitalization. (Note: Such closing is not mandatory. Temporary assistance may be continued in accordance with established procedure.)

(3) The hospital to which the client was admitted is a non-reimbursable hospital.

For all types of assistance other than ADC or T-ADC, Codes 62 and 64 shall be used in these situations. For ADC and T-ADC cases, Codes 46 and 47 shall be used. If the hospitalized client's case is closed because of other factors affecting his eligibility, the appropriate closing code, other than one in this section shall be used.

All	Admitted to private institution. Specify name of institution and date of admittance.
All	Admitted to public institution (municipal, State or Federal). Specify name of institution and date of admittance. (Includes State or Federal hospital.)
All (except ADC and T-ADC)	Admitted to or still in private or voluntary hospital. Specify name of hospital or institution and date of admittance. If the client was admitted because of tuberculosis or mental illness, enter "TB" or "Psych" after the name of the hospital or institution. (See Section e, items 1-3 above; also applies to AB, AD, MAA and OAA cases after exhaustion of 42-day maximum period following a diagnosis of TB or psychosis.)

PY BOUND CLOSE IN CENTER

XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Code	Applicable Types of Assistance	Reason
64	All (except ADC and T-ADC)	Admitted to or still in municipal hospital. Specify name of hospital and date of admittance. If the client was admitted because of tuberculosis or mental illness, enter "TB" or "Psych" after the name of the hospital. (See Code 62 for closing situation and type of assistance.)

f. Reclassification of Regular Grant Cases and Other Changes in Type of Assistance.

These codes are not to be used for preinvestigation cases. When a preinvestigation case is reclassified to the regular grant of the same or a different type of assistance because of continuing need, Code 80, 81 or 82 must be used. If, because of some unusual case factor, Codes 80, 81 or 82 do not apply, use Code 99.

68	All (except ADC)	Receipt of T-ADC.
70	All (except ADC and T-ADC)	Receipt of AB.
71	All (except ADC and T-ADC)	Receipt of OAA.
72	All	Receipt of ADC.
73	All (except ADC and T-ADC)	Receipt of MAA.
75	HR, VA, ADC	Combined with active case receiving same type of assistance. Include case number.
76	All	Receipt of another type of public or private aid in New York City. Specify type of aid. (Examples: Foster Care, Shelter Care. Does not include reclassification to any type of public assistance.)
77	All	Receipt of aid from another state. (Do not include cases considered eligible for aid in another state where there is no assurance of receipt of such aid at present or in the future. For such cases, use Code 88.)
78	HR, VA	Receipt of Veteran Assistance or Home Relief. (To be used only for Home Relief cases reclassified to Veteran Assistance, or Veteran Assistance cases reclassified to Home Relief.)
79	HR, VA	Receipt of AD.

g. Reclassification of Preinvestigation Grant Cases.

80	PAB, PADC, POAA, PAD, PT-ADC	Receipt of regular grant for same type of assistance.

XI. CODES USED IN CLOSING AND RECLASSIFYING CASES (Continued)

Applicable Types of Assistance	Reason
PAB, PADC, POAA, PAD, PT-ADC	Receipt of_____. Investigation incomplete. Specify other type of assistance.
PAB, PADC, POAA, PAD, PT-ADC	Receipt of_____. Ineligible for regular grant. Specify other type of assistance.
h. Moved or Whereabouts Unknown.	
All	Moved to another county or district within the State. Specify date of moving and whether absence is temporary or permanent. (If client moved because of support by relatives or friends, use Code 17.)
All	Moved out of State. Specify date of moving and whether absence is temporary or permanent. (If client moved because of support by relatives or friends, use Code 17.)
All	No contact, cannot locate, or whereabouts of client is unknown.
i. Miscellaneous	
All	Other reasons. Specify. (This code should be used only if none of the foregoing reasons is applicable.)

ing Reason Code requiring special case closing entry for AB, AD, ADC, T-ADC, or OAA case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 62

JACK R. GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Appellant,

vs.

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEES.

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INDEX.

PAGE

Interest of Amicus Curiae, National Institute for Education in Law and Poverty 1

Summary of Argument 4

Argument 6

I. A Recipient of Public Assistance Benefits Has a Constitutional Due Process Right to Notice and a Trial-Type Administrative Hearing, Which Hearing Must Be Afforded Him Before the Agency Can Impose Any Adverse Consequences Upon His Previously Determined Entitlement 6

A. The Time Has Come for This Court to Squarely Repudiate the "Right vs. Privilege" Dichotomy and to Reaffirm That Regardless of the Nature of the Affected Interest Due Process Forbids the Government From Ever Acting Arbitrarily Either Substantively or Procedurally, Against a Citizen 10

B. The Interest of the Welfare Recipient in Subsistence Is So Fundamental as to Require the Government to Meet the Most Stringent Standard of Due Process Before It May in Any Way Impair His Entitlement 17

C. The Recipient's Constitutional Right to a Prior Trial-Type Hearing Is Not Precluded by the "Legislative vs. Adjudicative" Dichotomy, for in All Cases a Recipient Poses Questions Historically and Functionally Addressed to Adjudication 20

D. The Hearing to Which Welfare Recipients Are Constitutionally Entitled Must Occur Before Benefits Are Terminated, Suspended, Reduced or Otherwise Withdrawn 25

E. The Constitutional Due Process Hearing to Which the Welfare Recipient Is Entitled Must Contain, at a Minimum, Nine Basic Elements Recognized by This Court 32
1. Notice 35
2. Discovery 36
3. Right of Counsel 37
4. Oral Hearing 40
5. Confrontation and Cross-Examination.. 40
6. Right to Present Evidence and Make Oral Argument 42
7. Impartial Tribunal 43
8. Decision on the Record 44
9. Judicial Review 45

II. The New H. E. W. Regulations Cannot Serve as the Basis for a Non-Constitutional Resolution of This Case, and Are Unconstitutional on Their Face 47

A. The H. E. W. Regulations Cannot Serve as the Basis for the Court's Resolving This Case in a Non-Constitutional Manner 47

B. The H. E. W. Regulations Are Inconsistent With the Fundamental Principles of Due Process and Are Thereby Unconstitutional 51

1. The Regulations Promulgated by H. E. W. Permit and Encourage the States to "Suspend" Assistance Without Affording an Opportunity for a Prior Hearing 51

2. The H. E. W. Regulations, Requiring the Continuation of Assistance Only in Cases Where the Request for a Hearing Is Based Upon Issues of Fact or of Judgment, Permit and Encourage the Arbitrary Denial of Due Process Rights 53

3. The H. E. W. Regulations Shift to the Recipient the Critical Burden of Justifying a Prior Hearing, and Thereby Erect an Impermissible Barrier to the Exercise of His Due Process Rights 57

4. The H. E. W. Regulations Permits the States to Reduce or Withdraw Assistance Until Such Time as the Recipient Requests a Fair Hearing, Thereby Depriving Him of His Right To Be Heard Before His Statutory Entitlement Is Impaired 60

Conclusion 63

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.....9, 10, 16, 23, 33, 34, 36
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§ 6300(c) 24, 59
§ 6300(d) 61
§ 6300(g) 43
§ 6300(h) 43
§ 6300(j) 35, 58
§ 6300(k) 38
§ 6300(l) 35
§ 6300(n) 36, 40, 41, 42
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BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEES.

INTEREST OF AMICUS CURIAE, NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY.

The National Institute for Education in Law and Poverty was established at Northwestern University School of Law in 1967 to devise and carry out a program of educational and research support services for the some 2,000 attorneys who are providing free legal assistance for the poor in Legal Services Programs throughout the United States. The objective of the Institute has been to assist

these attorneys in better serving the interests of their clients—the poor, those who cannot afford private counsel to aid them in asserting and vindicating their legal rights.

The media through which the Institute has sought to carry out its mandate have included both the spoken and the written word. Through the sponsorship of educational courses—with a total enrollment as of this writing of more than 3,000 lawyers—the Institute has attempted to illuminate those areas of the law in which innovative effort by poverty law practitioners might serve better to protect the legal interests of their clients. Research in the subjects that comprise the ever-burgeoning body of "poverty law" has led to the publication of seven volumes, in fourteen editions, of materials on the law affecting those who live in poverty. The Institute's *Handbook* series addresses both the law as it exists today and as it ought to be. Through its Clearinghouse Division and its monthly periodical, the *Clearinghouse Review*, the Institute provides for the nation's Legal Services attorneys a central gathering point for the collection and dissemination of pleadings, memoranda of law and other legal work-products of legal assistance practice as well as a forum for the publication of scholarly comment on the legal questions affecting attorneys for the poor.

The legal issues considered by the Institute through all these media have covered the entire spectrum of subjects relevant to the legal problems of the nation's poor. Consumer law, economic development, education, housing and community services have all been addressed by the Institute's educational courses and publications. Throughout, however, a special attention has been reserved for the legal problems of those who are, or ought to be, recipients of public assistance benefits. The Institute's *Handbook on Welfare Law*, now in its fourth edition, and the curriculum for educational courses on the law of welfare have dealt

with such matters as establishing and retaining eligibility, fair hearings, preserving client dignity and privacy, insuring payment based on actual need and guaranteeing fair and rational administrative processes.

Legal questions surrounding a welfare recipient's right to a hearing prior to termination or reduction of assistance have occupied the attention of the Institute since its inception. The process of education being a two-way street, the Institute has learned from its experience in dealing with the nation's Legal Services attorneys that the plight of public assistance recipients who are deprived of sustenance without prior hearing is a matter of the gravest concern and urgency. Thus, the Institute has engaged in extensive research on the fair hearing process in an effort to determine what constitutional and statutory norms must apply to assure that the legal rights of welfare recipients are properly vindicated. In this effort, the Institute has been fortunate to have among its staff the authors of two of the pioneering products of legal research in the welfare fair hearing area: Daniel Wm. Fessler, co-author of *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience,* 16 Am. U. L. Rev. 199 (1967); and Christopher N. May, author of *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234 (1967). Both of these articles are among the authorities cited in briefs before the Court in this case.

With the consent of both parties, pursuant to Rule 42 of the Supreme Court Rules, the National Institute for Education in Law and Poverty respectfully submits this brief, Amicus Curiae, in support of appellees.

SUMMARY OF ARGUMENT.

The constitutional right of a recipient of public assistance to notice and hearing before his previously determined statutory entitlement may in any way be impaired was, in the view of amicus, unequivocally established by this Court more than sixty years ago in the case of *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908).

In reaffirming the principle of that case, amicus would ask this Court to deal the final and finishing blow to the "rights vs. privileges" dichotomy which still haunts and distorts the administration of justice in the lower courts and administrative agencies. The protections of due process are available wherever government would act to impair the interests of any of its citizens, whether those interests be characterized as privileges or rights. This Court has long recognized that due process is a flexible standard, the content of which must be determined in every case by a weighing of the competing interests at stake.

Wherever the government poses a substantial threat to the life of one of its citizens, this Court has always required that the State satisfy the most stringent standards of due process. The same strict standards must be applied in the instant case, where the government would withdraw the bare means of subsistence from recipients who by definition have been previously found eligible on the basis of a primitive and dire need. This Court should articulate the principle which was the silent premise of two of its earlier decisions this year—that the individual's fundamental interest in subsistence requires that the government satisfy the highest standards of proof and rationality whenever it would seriously threaten to take the health or the life of any of its citizens.

Just as the protections of due process may not be denied

the recipient of welfare on the ground that his interest is a mere "privilege," neither may these safeguards be abridged through resort to the distinction between legislative and adjudicative functions. Amicus does not quarrel with this dichotomy, which limits the opportunity to be heard to those functions of the agency which are adjudicative in nature. Rather, amicus contends only that in all instances where the recipient is aggrieved by an agency threat to his previously established entitlement, the recipient's contest will pose questions which are historically and functionally addressed to adjudication.

As applied to the instant case, due process requires that the hearing to which the welfare recipient is constitutionally entitled must occur before the agency may in any manner reduce, condition or withdraw benefits awarded on the basis of previously determined statutory entitlement. A long line of decisions of this Court supports the necessity of such a prior hearing, and while the Court has upon rare occasion found the use of a summary procedure to be justified, this has only been where such a procedure is firmly rooted in history, or where the emergency nature of the circumstances do not permit the delay of a prior hearing. Neither of these exceptions justify the use of the extraordinary summary process in the administration of public welfare, particularly as this Court has never permitted its use when the sole interest of the state is, as it is here, the saving of revenue.

In assessing the requisite elements of the prior trial-type hearing, it is appropriate to look not only to the relevant constitutional decisions of this Court, but as well to the professional determinations of the agency charged with administering the categorical assistance programs. This dual analysis suggests that the prior hearing must contain, at a minimum, the following nine elements: (1) notice;

(2) discovery; (3) the right to counsel; (4) an oral hearing; (5) confrontation and cross-examination; (6) the right to present evidence and make oral argument; (7) an impartial tribunal; (8) a decision on the record; and (9) judicial review.

The regulations proposed by H. E. W. cannot serve as the basis for a non-constitutional resolution of this case, in that they do not extend to the purely locally-funded general assistance programs in which six of the plaintiffs are recipients. As to these plaintiffs, a constitutional decision is required. Furthermore, the proposed regulations are on their face unconstitutional, for they both permit and encourage the states to continue suspending, withholding and otherwise withdrawing assistance without affording the aggrieved recipient an opportunity for a prior hearing.

ARGUMENT.

I. A RECIPIENT OF PUBLIC ASSISTANCE BENEFITS HAS A CONSTITUTIONAL DUE PROCESS RIGHT TO NOTICE AND A TRIAL-TYPE ADMINISTRATIVE HEARING, WHICH HEARING MUST BE AFFORDED HIM BEFORE THE AGENCY CAN IMPOSE ANY ADVERSE CONSEQUENCES UPON HIS PREVIOUSLY DETERMINED ENTITLEMENT.

In the view of amicus, the right to notice and hearing before one may be deprived of benefits to which he has been previously found legally entitled, as in the case of recipients of public assistance, was settled by this Court as a constitutional requirement of due process of law more than sixty years ago. In *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908), a unanimous opinion of this Court declared:

> In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights

by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

An analysis of the facts in *Garfield* reveals a substantial analogy to the administration of public assistance benefits.

Involved in the *Garfield* case was the administration of Acts of Congress providing for the distribution of money payments and certain lands among individual members of specified Indian tribes. Eligibility for benefits was to be determined on the basis of citizenship in one of the tribes, and an administrative procedure was established to determine such citizenship and enroll applicants found to be eligible. Act of June 10, 1896, ch. 398, 29 Stat. 339; Act of June 28, 1898, ch. 517, § 11, 30 Stat. 497; Act of July 1, 1902, ch. 1362, 32 Stat. 641. The legislation provided that persons applying and meeting the statutory criteria for eligibility should, upon certification, be entitled as of right to the benefits of the Act, Act of July 1, 1902, ch. 1362, §§ 3, 11, 23, 25, 32 Stat. 641, just as in public assistance persons meeting the statutory eligibility criteria must be awarded the benefits provided by the Social Security Act as a matter of statutory entitlement. See *King* v. *Smith*, 392 U. S. 309, 317 (1968); Social Security Act of 1935, as amended, §§ 402(a) (10), 406(a), 42 U. S. C. §§ 602(a) (10), 606(a) (Supp. IV, 1969). Also like public assistance, where a fair hearing must be afforded applicants whose claims are denied, Social Security Act of 1935, as amended, § 402(a) (4), 42 U. S. C. § 602(a) (4) (Supp. IV, 1969), the legislation involved in *Garfield* established procedures for the adjudication of disputes concerning eligibility. Act

of June 10, 1896, ch. 398, 29 Stat. 339; Act of July 1, 1902, ch. 1362, §§ 24-25, 27-33, 32 Stat. 644.

Petitioner, Goldsby, made application on behalf of himself and his minor children for the benefits provided by the Act, and was found eligible by the Commision responsible for administering the distribution program. His enrollment was approved by the Secretary of the Interior on October 6, 1905. Thereafter, petitioner received an allotment of land and commenced enjoyment of the benefits provided by the Congress. Seventeen months passed, and the Secretary changed his mind. On March 4, 1907, without notice or opportunity for hearing, Goldsby's name was stricken from the rolls. On the precise point that such a procedure involved a denial of due process, Goldsby petitioned the lower federal courts for a writ of mandamus against the Secretary of the Interior seeking to restore the status quo. He was successful. 211 U. S. at 256-58.

The Secretary's appeal to this Court was unanimously rejected. While the case involved questions of statutory construction, the Court affirmed on a rule of decision which swept beyond the particular facts and addressed itself generally to the broader question of the relationship between the individual citizen and the state. There is, said the Court, "no place in our constitutional system for the exercise of arbitrary power. . . . The right to be heard *before* property is taken or *rights or privileges withdrawn*, which have been previously legally awarded, is of the *essence of due process of law.*" 211 U. S. at 262 (emphasis added). *Accord, Ex parte Robinson*, 86 U. S. 505, 513 (1873): "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

The arbitrary cessation of benefits without notice or prior hearing is surely at least as pernicious when the disadvantaged victims are public assistance recipients, who look to the benefits at stake for their very survival, as it is in the case of Indians deprived arbitrarily of the enjoyment of their ancient tribal lands. If, as amicus believes, the rule of *Garfield* v. *Goldsby* requires notice and prior hearing as much in the former case as in the latter, there remains the question as to the nature of the proceeding required to assure the due process of law. Amicus contends that the answer to this question too is well settled by long-established principles enunciated by this and other courts. When, as in public assistance determinations which would deprive recipients of previously-enjoyed benefits, "governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals," nothing less than a full trial-type hearing will suffice to satisfy the requirements of due proces. "[I]t is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960); *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, 199 (1933); *Philadelphia Co.* v. *S.E.C.*, 175 F. 2d 808, 817 (D. C. Cir. 1948). In the *Philadelphia Co.* case, the court provided a concise summary of the protective norms which amicus believes to be constitutionally required here (175 F. 2d at 817):

> It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution.

To this list we would add a right to have the agency decision made by an impartial hearing officer, *In re Murchison*, 349 U. S. 133 (1955); which decision is based solely upon the record made at that hearing, *United States and I. C. C.* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 288-89 (1924); *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n. of Ohio*, 301 U. S. 292, 300-04 (1937). These contentions will be revisited in a subsequent section of this brief.

Amicus respectfully contends that *Garfield* v. *Goldsby, supra,* and *Hannah* v. *Larche, supra,* are controlling; and to the extent that current or proposed administrative practices either as formulated or applied deny welfare recipients adequate notice and a prior trial-type hearing, they unconstitutionally deny "the essence of due process." *Goldsby, supra,* 211 U. S. at 262.

A. The Time Has Come for This Court to Squarely Repudiate the "Right vs. Privilege" Dichotomy and to Reaffirm That Regardless of the Nature of the Affected Interest, Due Process Forbids the Government from Ever Acting Arbitrarily, Either Substantively or Procedurally, Against a Citizen.

A resolution of this appeal based on *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908), affords this Court a singular opportunity to finally eradicate a legal aneurysm which too long has threatened disruption in the flow of due process. Reference is to the "right vs. privilege" dichotomy. While amicus contends for a total demise in all circumstances, the destruction of this determinant in the context of this case—and the primitive human interests here affected—is most appropriate. The unavoidable lesson of *Garfield*, that "the right to be heard before property is taken or *rights or privileges withdrawn*," is a complete answer to the dichotomists. *Ibid.* (Emphasis added). Yet,

as will be shown, the words of this Court have not been entirely heeded in the more than sixty intervening years.

Among the most troublesome aspects of public assistance administration is the notion that a citizen has no recourse to the norms of due process if the government's action threatens a "privilege" as opposed to a "right". This dichotomy, which was crystallized in an epigram coined by Mr. Justice Holmes during his service on the Supreme Judicial Court of Massachusets,[1] places a premium upon labels and abstract characterizations rather than focusing upon the techniques which the government seeks to employ and their effect upon the threatened interest which is at stake. First articulated in 1892, such a distinction was of questionable value even in that era of rugged individualism when the role of government, save for police protection, bore little direct impact on the life of a private citizen. It is a wholly dangerous and unacceptable determinant in an age marked by an ever-increasing social interdependence and an expanding popular function of government as a source of both direction and limita-

1. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517 (1892). It would appear to amicus that Mr. Justice Holmes was not a victim of the "facile generalization" which his epigram in the *McAuliffe* case has spawned. Twenty-six years after the statement was articulated, Holmes wrote:

> [F]or legal purposes a right is only the hypostatis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it.

Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918).

Upon reflection, "privilege" has come off no better. "Suffice it to note that 'privilege' is simply a label which expresses a conclusion reached on other grounds; it tells us nothing about the reasons, if any, for the conclusion." Byse, *Opportunity To Be Heard in License Issuance*, 101 U. Pa. L. Rev. 57, 69 (1952).

tion in the pursuit of "private interests." Yet, riddled with exceptions, this judge-made invitation to oppression continues to survive . . . if not in this Court . . . then in the minds of countless administrative bureaucrats and magistrates to whom it is an ever present summons to complete by semantics journeys only analytically begun.

The persistent refusal of even the most sympathetic lower courts to recognize a constitutional "right" in the individual needy citizen's claim to assistance benefits has meant that this dichotomy continues to cloud access to due process for a class of citizens particularly susceptible to abuse at the hands of arbitrary government officials. *Smith* v. *King*, 277 F. Supp. 31, 40 (M. D. Ala., 1967), "It should be noted that there is no vested legal right for anyone to receive public financial assistance; . . ."; *Camerena* v. *Department of Public Welfare*, 9 Ariz. App. 120, 449 P. 2d 957, 960-61 (1969), "We agree that the right to receive benefits is not a constitutional right"; and, *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1115 (D. Me., 1969), "Unquestionably, there has historically been no vested right to public welfare." In each of these cases, the court was able to go beyond this stumbling block by a technique analogous to the old confession and avoidance. In *Smith* and *Westberry*, the Equal Protection Clause became the vehicle for achieving constitutional protection. In *Camerena*, the court expressly joined a "growing number of cases which depart from this rigid doctrine and apply constitutional principles of procedural fairness even though only a privilege is involved." 449 P. 2d 961.

From time to time, this Court has found the dichotomy productive of unconscionable results and has refused to apply it. This has led to its erosion on a case by case basis. Most recently—and of special significance in the context of public assistance administration—the Court only last term rejected the notion that the invocation of

this ancient doctrine might somehow obviate the unconstitutionality of durational residence requirements for Aid to Families with Dependent Children. "This constitutional challenge cannot be answered", said the Court, "by the argument that public assistance benefits are a 'privilege' and not a 'right'." *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969).

Other contexts as well have seen the dichotomy fall by exception. Public employment: "To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192 (1952). "Of course no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 182-83 (1951) (Douglas, J., concurring). Unemployment compensation: "Nor may . . . the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963). Practice of professional employment: "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege'. Regardless of how . . . characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 n. 5 (1957).

Notwithstanding these inroads, the dichotomy enjoys a current vitality in the minds of countless more-or-less in-

formed state and local officials. The recent position of the Attorney General of Maine is illustrative of the danger that lies in eroding a doctrine which should be squarely repudiated. In *Westberry* v. *Fisher, supra,* 297 F. Supp. at 1115, the court noted: ". . . The Attorney General's position is simply that, since there is no vested right to public welfare, the State may distribute its largesse in any way it wishes and among any of its citizens it chooses to favor." Although the court rejected this assertion, the impact of its decision was simply to create another exception to the doctrine. And while one commentator has recently declared on the basis of extensive research that the "right *vs.* privilege" dichotomy is either dead or dying,[2] *it remains for this Court to finally inter the notion, itself abstractly disquieting, that in some unarticulated circumstances the government, and those acting under color of its authority, are free to act in a manner totally unfettered by the strictures of fundamental fair play.*

This Court has never condoned the exercise of arbitrary and capricious conduct on the part of agents of the state. Due process has always meant at least that. "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict." *Jones* v. *S. E. C.,* 298 U. S. 1, 24 (1936). Amicus asks only that the Court now make unequivocally clear that this unbending rule of due process must prevail whenever government would act to impair the interests of its citizens, *and that it can know of no exception whether those interests be characterized as matters of "privilege" or of "right."*

2. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). See also Comment, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234, 1237-39 (1967).

Amicus believes its plea for such an articulation of the minimal requirements of due process asks not for the promulgation of a new and novel doctrine, but rather for the reassertion of what ought to be the inescapable reading of countless decisions already rendered by this Court. See *Shapiro* v. *Thompson, supra*; *Wieman* v. *Updegraff, supra; Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra; Sherbert* v. *Verner, supra; Schware* v. *Board of Bar Examiners, supra; Jones* v. *S. E. C., supra.* Against this authority, the "facile generalization" (*Wieman* v. *Updegraff, supra*, 344 U. S. at 191), that is the "right *vs.* privilege" dichotomy surely has no place. Yet the persistent question, "does the aggrieved citizen seek vindication of an interest in which he has a right?" indicates that the dichotomy thrives at a lower level of decision—both judicial and administrative—where it works great mischief in tribunals having neither the time, the vision, nor the inclination to pass beyond the facile. Where the delicate relationship between the individual citizen and the impersonal state is in dispute the facile solution is too often dangerous. Surely it is here. Responsible state and local officials vested with a mandate to provide bare sustenance to the least advantaged of our citizens still deem themselves to be acting out of grace. *E. g., Westberry* v. *Fisher, supra*, 297 F. Supp. at 1115. But nearly seventy years ago this Court declared: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409 (1900). That lesson must be reinforced in the plainest terms.

Having once again declared that those who exercise the power of government are never free to act in an arbitrary or capricious manner—and that the characterization of the interest at stake as "right" or "privilege" is irrelevant for this rule of due process—amicus would urge the Court

to rearticulate its position as to the content this due process right must have in any given case. This Court has said many times that "by 'due process' is meant one which, following the forms of law, is *appropriate to the case, and just to the parties to be affected.*" *Hagar* v. *Reclamation District,* 111 U. S. 701, 708 (1884) (reviewing early authorities) (emphasis added). "'[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process." *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 162-63 (1951) (Frankfurter, J., concurring). See also *Hannah* v. *Larche,* 363 U. S. 420, 442 (1960). Thus, not only is the content of due process protection to be tailored to the requirements of each particular case, but the remoteness or immediacy of the citizen's interest, its quality and quantity, are all elements which are properly accounted in striking a balance between economy and convenience to the state, on the one hand, and the injury, inconvenience and debasement of the individual citizen on the other.

In this context, amicus believes this Court should declare anew that the due process norms of fundamental fair play must expand to adjust the weight of the government's burden of justification in direct ratio to the gravity of the citizen's threatened interest. *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra,* 341 U. S. at 163 (Frankfurter, J., concurring). In the opinion of amicus, the application of such a test could not but result in the imposition of the most stringent standard when, as in this case, the interest at stake is the most primitive and fundamental right to survive.

The Court of Appeals for the District of Columbia Circuit recently articulated a rule not unlike the one here urged by amicus, but in the context of government con-

tracts: "[T]o say that there is no 'right' to government contracts does not resolve the question. . . . Of course there is no such *right;* but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts." *Gonzales* v. *Freeman,* 334 F. 2d 570, 574 (1964). Surely the interest of citizens deprived of public assistance benefits to which they have been previously found entitled deserves no less protection.

B. The Interest of the Welfare Recipient in Subsistence Is so Fundamental as to Require the Government to Meet the Most Stringent Standard of Due Process Before It May in Any Way Impair His Entitlement.

For millions of this country's poor, public assistance represents "the very means to subsist. . . ." *Shapiro* v. *Thompson,* 394 U. S. 618, 627 (1969). The arbitrary or erroneous withdrawal of these critical benefits from one who is still in need may well cause an irreparable harm to health, or the loss of life itself. Given this most primitive and brutal need, it is imperative that before the welfare recipient's statutory entitlement may be impaired, he be given nothing less than the full panoply of constitutional due process protection.

Recognizing that certain human interests are more fundamental than others, this Court has held them deserving of special judicial protection. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942) (marriage and procreation); *Brown* v. *Board of Educ.,* 347 U. S. 483 (1954) and *Bolling* v. *Sharpe,* 347 U. S. 497 (1954) (education); *Griffin* v. *Illinois,* 351 U. S. 12 (1956) (criminal appeals); *Reynolds* v. *Sims,* 377 U. S. 533 (1964) (voting). Where such fundamental interests

are at stake, whether it be in the context of due process or equal protection, this Court has insisted upon imposing a strict standard of judicial review.[3]

In two recent cases in which the government threatened to upset the precarious balance which the poor had wrought from life, this Court applied the strictest standard of review. *Shapiro* v. *Thompson, supra; Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). The decisions in both of these cases reflect the Court's awareness of the peculiar and oftentimes overwhelming problems of the poor. And while the opinions in both cases were couched in relatively orthodox terms, there lurked beneath the surface a principle which amicus would ask this Court to articulate unequivocally today: *that the interest of all citizens in subsisting and enduring in an affluent age of sometimes heartless change is a personal interest of the most fundamental and profound proportions, and is susceptible of being threatened only by means consonant with the strictest standards of proof and rationality.*

Amicus does not ask this Court to deliver the affirmative right to life whereby the State would be constitutionally obliged to assure all of its citizens an adequate existence. Rather, amicus simply asks this Court to require, as it has done in all other areas where the government would threaten the life of any of its citizens, that such actions of the State be held to the highest standard of constitutional due process.

In *Shapiro* v. *Thompson*, the Court required the state to show a "compelling interest" before it could deny welfare assistance to otherwise eligible persons who had not satisfied the state's residency requirement. In a decision based upon the Equal Protection Clause, the Court found no

3. See Comment, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1127-32 (1969).

legitimate or compelling state concern, and held the residency laws unconstitutional. While the ostensible basis of the decision was interference with the constitutionally protected right to travel, the Court's obvious underlying concern was that these laws denied nearly two hundred thousand of the poor "the very means to subsist. . . ." 394 U. S. at 627. As Mr. Justice Harlan noted in his dissenting opinion, the majority came very close to identifying the brutal need to survive as a fundamental interest. 394 U. S. at 660-61.

In *Sniadach* v. *Family Finance Corp.*, the Court invalidated Wisconsin's prejudgment garnishment statute on the ground that it failed to comply with the "fundamental principles of due process," *i.e.*, "notice and a prior hearing. . . ." 395 U. S. at 342. In applying the flexible norms of due process, the critical factor for the Court was not that property was involved, but rather "the *nature* of that property." 395 U. S. at 340 (emphasis added). The attachment of wages posed a very real threat to subsistence, for the frequent effect of the garnishment law was to "impose tremendous hardship on wage earners with families to support." *Ibid.* "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." 395 U. S. at 341-42. As in *Shapiro*, the fundamental nature of the subsistence interest led the Court to impose the strictest standards of fairness, standards which, in both cases, proved to be insurmountable.

This same primitive and fundamental personal interest is again threatened in the case before the Court today. The Fifth and Fourteenth Amendments declare that no person shall be deprived of life without due process of law. While the due process provision has seen its greatest use in the criminal area, the changing role of government de-

mands that the scope of this constitutional safeguard be similarly adapted to meet threats newly posed to the poor. The era of the Elizabethan Poor Laws and the local care of the poor has passed. Today it is the federal government, along with the states, that has assumed the burden and the responsibility of caring for the needy. More than nine million persons, most of them children, now depend upon the sometimes shaky hand of State for their mere survival. And the number grows daily. Should that hand be arbitrarily or erroneously withdrawn from one still needy of its aid, health and life may likewise pass.

Mr. Justice Brandeis, speaking years ago for this Court, assured that the protections of due process were available to check the State, whether it would deprive of life, "or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922). Public assistance benefits represent the foundation upon which life may go on. Surely the poor are entitled to the same protection as the criminally accused. In both realms, the State must meet the very highest standards of due process before it may suffer an interest as precious as life to decline or perish.

C. The Recipient's Constitutional Right to a Prior Trial-Type Hearing Is Not Precluded by the "Legislative vs. Adjudicative" Dichotomy, for in All Cases a Recipient Aggrieved by the Agency's Threat Poses Questions Historically and Functionally Addressed to Adjudication.

On numerous occasions this Court has declared that hearings are required for judicial functions, but that when the agency is embarked upon legislative tasks the absence of notice and opportunity to be heard is not offensive to due process. *E.g., The Assigned Car Cases*, 274 U. S. 564, 582-83 (1927). The lesson is basically one of history. *Bi-Metallic*

Investment Co. v. *State Bd. of Equalization*, 239 U. S. 441, 445 (1915). And with it amicus has no quarrel. The fact that the Due Process Clauses have never been interpreted to confer an enforceable right to appear before a legislative body is acceptable when it is also recalled that from our earliest history a citizen aggrieved by the application of a legislative pronouncement, on the theory that as applied to his estate it was offensive to the "law of the land" has enjoyed a due process right to a judicial forum. See generally, Cooley, Constitutional Limitations, 352-53 (3d ed. 1874) (drawing upon the argument made by Daniel Webster before this Court in *Dartmouth College* v. *Woodward*, 17 U. S. (4 Wheat.) 518 (1819), and collecting early federal and state decisions).

Amicus contends that the dichotomy based upon agency function does not cloud the right of an individual recipient of assistance benefits to notice and a prior hearing in order that he might challenge an *ex parte* agency threat to his previously determined entitlement. In all such cases, the recipient's contest will pose questions historically and functionally addressed to adjudication. This historical and functional distinction was clearly drawn by Mr. Justice Holmes speaking for this Court in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908):

> . . . A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Based upon this distinction Mr. Justice Frankfurter gave guarded approval to a determinant reflecting function: ". . . when decisions of administrative officers in execution of legislation turn exclusively on considerations similar to

those on which the legislative body could itself have acted summarily, notice and hearing *may* not be commanded by the Constitution." *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra,* 341 U. S. at 167 (emphasis added).

Measured by these guidelines, "adjudication" is involved in every facet of the following—a typical public assistance conflict:

> Agency: "Mrs. Jones, it has come to our attention that you have an adult male living in your home. Under our rules your AFDC assistance grant must be reduced by taking into account his earnings. Please be advised that your November check will not be issued until this adjustment has been made."

In response to this notice, Mrs. Jones requests a "fair hearing" at which, unrepresented by counsel, she raises the following contentions:

> Client: "The 'man' to which your notice has reference is my mentally retarded brother. He has no money, and while he is around he is a drain on our already inadequate grant. Besides, even if he were to live with us permanently, for you to reduce the amount of my children's AFDC assistance is illegal."

Assuming that the local agency complies with current Federal Handbook directives and assists Mrs. Jones in "preparing [her] case" (Part IV, § 6300(b)), the recipient's request for a hearing raises two types of issues, both distinctly "adjudicatory".

In the first instance, Mrs. Jones is contesting the fact that the man found in her home presents the type of situation covered by the so-called "man in the house rule." The resolution of this factual dispute is clearly the historical function of the courts, and when performed by administrative bodies is inescapably "adjudicatory" in nature. Of equal importance is the second issue . . . her constitutional and statutory argument that in threatening her with the

man in the house rule the agency is seeking to destroy or diminish her previously determined entitlement in a manner which is offensive to law. Again, an interpretation of the mandate of constitutional and statutory rules so as to make "binding determinations which directly affect the legal rights of individuals" involves an exercise of the judicial function, and hence requires an application of those "procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960). To deny that this challenge poses questions of an "adjudicatory" nature requires the assertion that historically and functionally such challenges have been determined in the halls of Congress and the several state legislatures. Such an absurd proposition finds no basis in history, and is offensive to the basic notion of the separation of powers. See generally, Cooley, Constitutional Limitations, *supra*, at 352-53. *C.f.*, *Crowell* v. *Benson*, 285 U. S. 22, 56-7 (1932); and, *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289 (1920).

The simple fact of the matter is that in the field of public assistance administration neither state nor local agencies engage in pure "rule making" activities. Thus, their decisions never "turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily. . . ." *Joint Anti-Fascist Refugee Comm., supra*, at 167. Rather, in a challenge to an existing assistance grant (on any of the aforementioned grounds) the agency inquiry "declares and enforces liabilities as they stand on present or past facts *and* under laws supposedly already to exist." *Prentis, supra*, 211 U. S. at 226 (emphasis added). Where this function is the agency's end, the command is clear that judicial process must be the means. *Hannah* v. *Larche*, *supra*, 363 U. S. at 442.

The accuracy of this characterization is reflected in the current provisions of the Federal Handbook which define

the scope of the "fair hearing" to expressly include: "Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation." Handbook, Part IV, § 6300 (c)(2). Far from being an act of "agency grace" amicus contends that this provision of the Handbook represents a valid recognition that, within the context of an individual recipient's case, the threat to an established grant predicated upon a formal or informal interpretation of the law (both constitutional and statutory) represents a topic ripe for "judicial determination." Standing having been conferred by "their application to his situation," to accord the recipient a "fair hearing" is to observe the requirements of due process.

Where the recipient's position takes the form of an exclusive attack upon the legal validity of the rule under which the agency is seeking to adversely affect his previous entitlement (and amicus contends that this will rarely be the case), he has a due process right to a "fair hearing." The final question is whether such a recipient is somehow less entitled to a "prior hearing" than would be the case if his resistance also took the form of a factual dispute. Garfield v. *Goldsby, supra,* 211 U. S. at 262, suggests no relaxation in the requirement that the "right to be heard" take the form of a prior proceeding. Equally dispositive is the undeniable fact that the need of the recipient, that he should not be summarily stripped of the necessities of physical subsistence, is identical in both cases. *Shapiro* v. *Thompson,* 394 U. S. 618, 627 (1969). Thus while the flexible norms of due process might well be satisfied by a hearing in which the reasonableness or equitableness of the agency's interpretation of the law was the subject of "argumentation" as opposed to a "trial-type" proceeding, amicus would contend that it does not present the "extraordinary" situation

in which a deviation from the norm of a "prior hearing" is permissible. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 339 (1969). See Part I-D, *infra*.

D. The Hearing to Which Welfare Recipients Are Constitutionally Entitled Must Occur Before Benefits Are Terminated, Suspended, Reduced or Otherwise Withdrawn.

> "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also." *The King* v. *The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Str. (K. B.) 557, 567; 93 Eng. Reports 698, 704 (1723) (Fortescue, J.).

The principle that one has a right to be heard before he may be adversely harmed by the state is "[t]he fundamental requisite of due process of law . . ." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914), and has been deeply woven into the fabric of our Anglo-American civilization since the time of the Magna Charta. One of the earliest American formulations of this fundamental constitutional principle interpreted the due process provision of the New York constitution, and was referred to by this Court in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U. S. [18 How.] 272, 280 (1855).

> "The meaning of the section then seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be

> ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, *before* either of them can be taken from him." *Taylor* v. *Porter*, 4 Hill 140, 146, 15 N. Y. Common Law Rpts. 773, 775 (N. Y. Supreme Court, 1843). [emphasis added.]

This basic principle has been articulated and enforced by this Court upon far too many occasions for there to be any lingering doubt as to its central place in our constitutional system of government.

In 1876, quoting from Justice Story's opinion in *Bradstreet* v. *Neptune Insurance Co.*, 3 F. Cas. 1184, 1187 (C. C. D. Mass. 1839), this Court stated that "It is a rule . . . founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence *before* his property is condemned. . . ." *Windsor* v. *McVeigh*, 93 U. S. 274, 280 (1876) [emphasis added].

In 1895, in *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537, the Court again articulated this due process principle, collecting a number of the earlier authorities.

> "That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment to the Constitution, which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660; *Lent* v. *Tillson*, 140 U. S. 316; *Pittsburg, Cincinnati & E. Railway* v. *Backus*, 154 U. S. 421."

Several years later in another suit involving taxation, the Court held that "due process of law requires that at some stage of the proceedings *before* the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard. . . ." *Londoner* v. *Denver*, 210 U. S. 373, 385 (1908) [emphasis added]. That same year, this Court declared that, "The right to be heard *before* property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law." *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908) [emphasis added].

In *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, 199 (1933), a case challenging a state order requiring the railroad to construct an overpass, the Court held that, "*Before* its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing on the fundamental facts." [Emphasis added.]

A year later, in *United States* v. *Illinois Cent. R.R.*, 291 U. S. 457, 463 (1934), this Court held that while the Interstate Commerce Commission could initiate a rate change without formal proceedings, due process required "a full and fair hearing *before* the order became operative." [Emphasis added.] The principle was again reiterated several years later in *Morgan* v. *United States*, 304 U. S. 1, 18-19 (1938):

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals *before* it issues its final command." [Emphasis added.]

This Court in 1941 upheld a minimum wage order, stating that "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as

the requisite hearing is held *before* the final order becomes effective." *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 152-53 (1941) (emphasis added). And more recently, in *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950), this Court again formulated the constitutional rule. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." [Emphasis added.]

The clearest and most helpful statement of the due process norm is perhaps that of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (concurring opinion): "This Court is not alone in recognizing that the right to be heard *before* being condemned to suffer *grievous loss of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." [Emphasis added.] Four other members of this Court adopted this statement of the rule in *Cafeteria and Restaurant Workers* v. *McElroy*, 367 U. S. 886, 901 (1961) (Brennan, J. dissenting).

Only a few years ago, in a case upholding a father's right to a hearing before his natural child could be taken from him by adoption, this Court observed that, "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U. S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965).

This Court's most recent articulation of the constitutional right to be heard before the government may adversely affect one's interests, was in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), in which Wisconsin's

prejudgment garnishment statute was held unconstitutional. The Court, citing *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314 (1950), stated that "In the latter case we said that the right to be heard 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . acquiesce or contest'." 395 U. S. at 339-40. Though the Court noted that "wages—a specialized type of property" were involved in the case, the analysis focussed much more centrally and meaningfully on the substantiality of the interest at stake. After noting that "a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall," the Court had no difficulty in holding that "absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U. S. at 341-42.

The case before this Court today requires a similar conclusion. Whereas the effect of a prejudgment garnishment of wages may be to "drive a wage earning family to the wall," the welfare recipient, even with the assistance he receives, finds himself already at the wall. And as the Court has noted, "[t]his constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.' " *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n.6 (1969). Rather, the critical factor must be the nature of the interest involved. Amicus strongly contends that the interest of the public welfare recipient, about to be deprived of the bare means of subsistence, is as great, if not greater than the similar plight of a family whose wages are attached.

Nor is the case before this Court today one of the "rare and isolated instances" in which summary administrative procedure is permissible. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., con-

curring). In *Sniadach*, this Court noted that "summary procedure," in which there is no opportunity for a hearing before the harm occurs, will meet the requirements of due process only in "extraordinary situations." 395 U. S. at 339. The use of the summary process has been characterized by this Court as a "drastic procedure." *Fahey* v. *Mallonee*, 332 U. S. 245, 253 (1947). This Court has *never* upheld the use of such a process where the sole interest of the state was to protect its purse.

In fact, the instances in which this Court has found use of the summary process to be constitutionally permissible are exceedingly rare. "Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 164-65 (1951) (Frankfurter, J., concurring). In a small number of cases, deeply-rooted historical precedent has legitimized use of a summary procedure. Thus, in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U. S. (18 How.) 272, 277 (1855), *Springer* v. *United States*, 102 U. S. 586 (1880), and *Phillips* v. *Commissioner*, 283 U. S. 589 (1931), this Court approved the summary seizure of property belonging to a debtor of the United States, on the ground that "since the establishment of the English monarchy," there has always been "a summary method for the recovery of debts due to the crown. . . ." 59 U. S. (18 How.) at 277. In *Lawton* v. *Steele*, 152 U. S. 133 (1894), the Court approved the summary seizure of fish nets illegally employed, under a statute permitting such abatement of a public nuisance. In *Ownbey* v. *Morgan*, 256 U. S. 94 (1921), this Court sanctioned Delaware's *ex parte* foreign attachment law which had its origin in the Custom of London. In *Cooke* v. *United States*, 267 U. S. 517 (1925), the Court noted that contempts committed in open court may be punished, as was the custom at common law,

summarily and without opportunity for a hearing. In *Coffin Bros.* v. *Bennett,* 277 U. S. 29 (1928), the Court permitted the property of shareholders of an insolvent bank to be summarily attached by the bank's creditors.

Aside from these few instances in which historical custom has prevailed, this Court has permitted the summary procedure only in cases in which the delay occasioned by a prior hearing would pose a serious and direct threat to the health, safety or well-being of other individuals. "If the contagion is spreading, or the harmful medicinal preparation is being sold to the public, summary administrative action in advance of hearing is appropriate. . . . Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." 1 K. Davis, Administrative Law Treatise, § 7.08, at 438 (1958). Thus, in *North American Cold Storage Co.* v. *City of Chicago,* 211 U.S. 306 (1908), this Court upheld the summary seizure and destruction of allegedly decayed poultry. In *Yakus* v. *United States,* 321 U. S. 414 (1944) and *Bowles* v. *Willingham,* 321 U. S. 503 (1944), the Court upheld summary price and rent regulations under the Emergency Price Control Act of 1942, on the ground that they were necessary to prevent inflation under the "exigencies of wartime conditions." 321 U. S. at 520. In *Fahey* v. *Mallonee,* 332 U.S. 245, 253 (1947), the Court upheld a conservator's summary take-over of an insolvent bank, the procedure being justified by "the delicate nature of the institution and the impossibility of preserving credit during an investigation. . . ." And, in *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950), this Court allowed the Food and Drug Administration to summarily seize allegedly mislabeled goods.

It clearly emerges from this analysis of the cases that the governmental interests which have in the past been

found by this Court to justify summary action without prior hearing are of an altogether different order than the interest of the state in withdrawing, without hearing "the very means to subsist—food, shelter and other necessities of life." *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969). There is no debt owing to the Crown here. Nor is there an emergency threat of harm to other individuals. The state's sole concern is the saving of revenue. Such a justification for denying the fundamental due processes of law has never been recognized by this Court. It should not be recognized for the first time today, in a case where the private interests at stake have never been more vulnerable and deserving of this Court's protection.

E. The Constitutional Due Process Hearing to Which the Welfare Recipient Is Entitled Must Contain, at a Minimum, Nine Basic Elements Recognized by This Court.

> "A fundamental requirement of due process is 'the opportunity to be heard.' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner."
>
> *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965).

In thus speaking for this Court, Mr. Justice Stewart capsulized centuries of Anglo-American theory and experience. As amicus has suggested in all but the most extraordinary situations only a prior proceeding has been deemed by this Court to satisfy the requirement of a "meaningful time." It now remains to consider the "meaningful manner."

It has already been established (Part I-C, *supra*) that individual assistance cases involve agency "adjudication" as opposed to "rule making." Hence in the case at bar ". . . it is imperative that [an agency administering a program of public assistance] use the procedures which have traditionally been associated with the judicial

process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960). Yet to establish that the procedures must be those of a "judicial" process is only to narrow the inquiry. An answer must evolve from a balance between the competing interests presented by the government goal and the individual citizen whose life, liberty, or property the state would seek to affect. In striking this balance, this Court has recognized that when faced with a timely objection from the proposed citizen-target, a meaningful respect for that individual's dignity requires that the government carry the burden of justification as to both the fairness of its methods and the validity of its proposed result. In thus testing the "hurt complained of" against "the good accomplished," this Court has varied the weight of the government's burden in direct ratio to the gravity of the citizen's threatened interest. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, *supra*, 341 U. S. at 163. In light of the primitive human stake which a welfare recipient risks in any confrontation with the administering agency, amicus now contends that the "fair hearing" must reflect strict adherence to those elements of "fundamental fair play" which this Court has identified as essential to the due process of law.

Were this an area of administrative law lacking in documented experience, amicus would concur in the desirability of an opinion in which this Court limited its observations to the broad outlines of the elements of fundamental fairness here required. Happily, this is not the case.

The decisions of this Court have identified nine elements of basic "fair play" the absence of which, individually or in combination, give rise to a viable claim that due process of law has not been observed.[4] Their appli-

4. These elements are identified and analyzed in Burrus & Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 Am. U. L. Rev. 199, 217-31 (1967).

cation in the field of public assistance administration is not an abstract exercise. In passing upon challenges to statutory programs, this Court has frequently displayed "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965) (collecting authorities). To this end, amicus has reviewed the provisions of the Handbook of Public Assistance Administration which is promulgated by the Secretary of Health, Education and Welfare pursuant to authority conferred by 42 U. S. C. A. § 1302 (1964).[5] From that record of accumulated experience in dealing with the economically and educationally disadvantaged, amicus finds clear Departmental recognition of the procedural norms which, in other contexts, have been articulated by this Court. All should concede that the norms of due process are flexible (*Hannah* v. *Larche, supra*, 363 U. S. at 442), and that they "cannot . . . be tested by mere generalities or sentiments abstractly appealing." *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra*, 341 U. S. at 163. Thus it is through a dual analysis of judicial decisions and distilled administrative experience that amicus will contend that strict observance of normative fair play on this primitive plateau of human need is not a matter of administrative grace. Rather, such procedures are a measured response to the demands of due process binding upon appellant in his administration of both categorical and non-categorical assistance programs. For as was stated by this Court many years ago: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409 (1900).

Though these administratively defined elements of the hearing for the most part coincide with those elements

5. Provisions of the Federal Handbook were considered by this Court in *King* v. *Smith*, 392 U. S. 309, 317 (1968).

hitherto found by this Court to be constitutionally required, the constitutional inquiry is still essential. The H. E. W. Handbook nowhere suggests that the hearing must occur before entitlement is impaired. The elements set out in the Handbook for the fair hearing are therefore not binding upon the state at the prior hearing, should the state adopt, as did New York, a dual hearing system. Nor would the new H. E. W. regulations, discussed in Part II, *infra*, appear to prohibit the state from adopting such an abbreviated prior hearing. Thus it is imperative that this Court identify the constitutionally required elements which must characterize the hearing the recipient is entitled to receive before his subsistence benefits may be impaired.

1. NOTICE: Within the context of public assistance administration, the current Handbook provisions require that notice of the *ex parte* agency challenge be given in writing to the recipient. This notice must affirm earlier oral information that the recipient has a right to receive a "fair hearing," and that if requested, such a hearing shall be conducted at a time, date, and place convenient to the claimant. Handbook, Part IV, §§ 6200(g) and 6300(j) (as amended by Handbook Transmittal No. 140 (Feb. 8, 1968)). Finally, "[n]otice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of this case." *Id.*, § 6300(1).

Assuming that this final provision refers to a requirement that the agency's written notice contain sufficient description of the charges being leveled so that the recipient is fairly apprised of the nature of the case he must contest, these provisions of the Handbook would seem to satisfy the due process requirements inherent in the concept of notice and apprisal as articulated by this Court. See, *Willner* v. *Committee on Character & Fitness*, 373

U. S. 96, 107-08 (1963) (Goldberg, J., concurring); *Hanna* v. *Larche*, 363 U. S. 420, 441 (1960); *Greene* v. *McElroy* 360 U. S. 474, 496-97 (1959); *Morgan* v. *United States*, 30 U. S. 1, 17-19 (1938); and, *Roller* v. *Holly*, 176 U. S. 39 409 (1900).

Concerning the element of time, the H. E. W. regulatio sets no arbitrary limit. Amicus believes this policy to b best suited for an administration that recognizes depend ing upon the nature of the charges, the situation of th recipient, his location flexibility is required. It is suff cient for this Court to rearticulate that "the requiremen of notice would be of no value whatever, unless such notic were reasonable and adequate for the purpose." *Rolle* v. *Holly, supra,* at 409.

2. DISCOVERY: Obviously related to the principle o notice is the requirement of some degree of pre-hearin discovery. The current Handbook regulations provid that: "The claimant or his representative will have th opportunity (1) to examine all documents and records use at the hearing. . . ." Part IV, § 6200(i)(1). This ters provision is the subject of elaboration in the section o "Criteria for the Administration of the [conformin State] Plans. There we find it made clear that the claim ant or his representative must have "adequate opportunit to examine material that will be introduced as evidenc prior to the hearing as well as during the hearing. . . Part IV, § 6300(n). And, finally that any material whic is not part of the agency record, or is held as "confidential and thus not something which the claimant has an "op portunity to hear or see" may not be "made a part o the hearing record or used in a decision on the appeal. Th hearing officer does not review the case record, or othe material prior to the hearing unless such material is mad available to the claimant or his representative." *Id* § 6300(o).

Assuming that this right of prior inspection is accorded the recipient or his representative at a point in time sufficient to permit a responsive case, the Handbook provisions appear to be a satisfactory response to the due process requirement that the recipient be accorded an opportunity "to know the claims of the opposing party. . . ." *Morgan* v. *United States,* 304 U. S. 1, 18 (1938).

3. RIGHT OF COUNSEL: By definition, the administration of public assistance benefits takes place among a class of society's least educated and most disadvantaged citizens. When it is recalled that the recipient's stake in a controversy with the agency assumes the gravity of his very means of physical subsistence, *Shapiro* v. *Thompson, supra,* 394 U. S. at 627, the presence of the guiding hand of counsel as a rudiment of fundamental fair play would seem self-evident.

In this area, an analysis of the Handbook regulations must carefully distinguish between those presently enforced and those officially proposed for eventual enforcement. Part IV, § 6200(f) currently provides that the notice to the recipient, which must be given at the time of any agency action affecting his claim, inform him "that he may be represented by others including legal counsel; and of any provision for payment of legal fees by the agency." Part IV, § 6500(c)(3) makes it clear that should the state plan include provision for legal services, federal financial participation is available in sharing such cost. Yet, as of this writing, no provision of the Handbook requires the states to make such services available. On November 30, 1968, the Department announced in the Federal Register a proposed new regulation which would, *inter alia,* require that in all categorical assistance programs, "The services of lawyers will be made available to welfare clients who desire them in fair hearings." Proposed H. E. W. Reg., 33 Fed. Reg. 17853-54 (Nov. 30, 1968). The original target imple-

mentation date for the new regulation, July 1, 1969, was put back to October 1, 1969, by the new Administration. Otherwise, the new regulation was confirmed. See 34 Fed. Reg. 1144 (Jan. 24, 1969). Amicus now understands that the most recent Departmental policy is to push the proposed implementation date back once again, this time until July 1, 1970.[6]

We begin the constitutional analysis of these regulations with *In re Groban*, 352 U. S. 330, 332 (1957), in which this Court acknowledged that a party under scrutiny in an adjudicatory administrative proceeding has a due process right to be "heard through his own counsel." Yet analysis cannot end on this left-handed note unless this class of indigents is to be the victim of an un-ending joke. To say that an indigent recipient of public assistance has a "due process right" to speak through her own attorney at the "fair hearing" is as comforting as a solemn declaration that she has a constitutional right to appear at that hearing swathed in mink. Amicus contends that the time has come for this Court to carry the lesson of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), yet another limited step by declaring that in the field of public assistance administration the substantial identity of the citizen's stake in the proceedings requires a like regard for his need of legal counsel. In *Gideon* this Court articulated a basic charter of protection for citizens faced with loss of life, liberty, or property in criminal proceedings. In the case at bar, these same in-

6. Further provisions of the currently enforced Handbook regulations make it clear that, should the recipient so desire, he may be represented at the "fair hearing" by a relative or friend. In an express recognition of the value of the "skill and knowledge of the legal profession in these [hearing] matters", the states are urged to make such provision. They are not required to do so, notwithstanding the availability of federal funds to partially defray the costs of such representation. Part IV, § 6400(a) (as amended by Handbook Transmittal No. 140 (Feb. 8, 1968)). And see, *Id.*, § 6300(k).

terests are before this Court. Indeed, the intensity of the loss may be even more pronounced. In the criminal area a frequent danger is the imposition of confinement. In the public assistance field it is often expulsion from the most primitive shelter. The Eighth Amendment would be at once offended if in the confinement situation there was a denial of adequate food or medical attention. In the waste basket for crumpled lives that claims too many of our homeless citizens we have thus far failed to exhibit a similar concern.

A recognition that our civil and criminal jurisprudence do not exist in separate air tight containers has had distinguished spokesmen in the history of this Court. "[T]he right to be heard before being condemned to suffer *grievous loss of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. at 168 (Frankfurter, J., concurring) (emphasis added). In *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922), Mr. Justice Brandeis, speaking for a unanimous Court, recognized that in an alien deportation case the individual was threatened with a possible "loss of both property and life; or of all that makes life worth living." Such a toll could not be exacted save by compliance with the norms of fair play inherent in the concept of judicial due process.

Unlike the field of criminal justice, the timing of a right to counsel in the context of public assistance administration should not prove troublesome. Amicus contends that when the agency serves notice of its *ex parte* challenge, the proceeding has reached an "accusatory state," and the recipient's right to legal assistance ripens so that he may have professional assistance in assessing the agency's notice and in utilizing his right of discovery in the prepara-

tion of a responsive case. *Cf., Escobedo* v. *Illinois*, 378 U. S. 478, 492 (1964).

4. ORAL HEARING: While a central issue in the trial of this case below, the right of a welfare claimant to present his contentions orally is a basic assumption of the Handbook regulations. Part IV, § 6400(a) (as amended by Handbook Transmittal No. 140 (Feb. 8, 1968)), details the rights of the welfare claimant to present "his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. . . . The hearing is conducted in an informal rather than a formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process." See also Part IV, §§ 6200(i)(5) and 6300(n).

The legal correctness of the Handbook position, and the decision of the court below, may be demonstrated by reference to the decision of this Court in *Londoner* v. *Denver*, 210 U. S. 373, 386 (1908). In that parent case this Court declared: "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." The point was emphatically stated in *Standard Airlines* v. *C. A. B.*, 177 F. 2d 18, 21 (D. C. Cir. 1949): "[I]n our jurisprudence an opportunity to present contentions orally, with whatever advantages that method of presentation has, is one of the rudiments of the fair play required when property is being taken or destroyed."

5. CONFRONTATION AND CROSS-EXAMINATION: The elements of confrontation and cross-examination go to the very heart of adjudicative procedures. The provisions of the Handbook expressly declare that in addition to a right

to examine all documents and records used at the hearing, the welfare claimant or his representative (be he lay or professional) shall be afforded an opportunity to "question or refute any testimony or evidence." Part IV, § 6200(i)(6). Section 6300(n) reinforces this requirement by declaring that: "The claimant or his representative [must be afforded] adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at issue he believes necessary without undue interference, to ask for substantiation of any statements made by others, and to present evidence in rebuttal." The integrity of these attempts to insure the welfare claimant an opportunity to know, to confront, and to test the adverse evidence and witnesses which the agency proposes to use against him is insured by a final provision that evidence which the claimant has "not [had] an opportunity to hear or see is *not* [to be] *made a part of the hearing record or used in the decision on the appeal.*" *Id.*, § 6300(o) (emphasis added).

Such stringent protection is in accord with historical experience and the decisions of this Court. That the concept of the faceless informer is contrary to our basic notions of "fair play" is easily documented. As early as 100 A. D., the Roman Emperor Trajan admonished Pliny the Younger that: "Anonymous information ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age." 9 Harvard Classics, 428 (quoted in *Carlson* v. *Landon*, 342 U. S. 524, 552 (1952) (Black, J., dissenting). This Court has been no more hospitable. In *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and

> the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . .

In addition to the authorities collected in *Greene* v. *McElroy, supra* at 497, see *Peters* v. *Hobby*, 349 U. S. 331, 351 (1955) (Douglas, J., concurring); *Gonzales* v. *Freeman*, 334 F. 2d 570, 578 (D.C. Cir. 1964); and, *Rios* v. *Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967) (a welfare case turning on this precise point).

6. Right to Present Evidence and Make Argument: The provisions in the Handbook which guarantee to the welfare client or his representative the opportunity to "give all the evidence on points at issue he believes necessary without undue interference," and "to advance any arguments without undue interference" have already been reviewed. Part IV, §§ 6300(n), and 6200(i)(5). In their combined effect, they guarantee to the welfare client the essence of an adjudicatory hearing.

Again, the decision of this Court in *Londoner* v. *Denver*, 210 U. S. 373, 386 (1908), stands for the proposition that in according the welfare claimant the rights to present evidence and make oral argument, the Department is not acting out of discretion or grace, but is complying with the requirements of procedural due process. *Esteban* v. *Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

7. IMPARTIAL TRIBUNAL: The Handbook provisions contain no fewer than five distinct provisions designed to insure to the welfare claimant that his cause was heard before an impartial official; and, when requested, the appeal processed by an impartial appeals authority. Part IV, § 6200(d) requires that all state plans qualifying for an infusion of federal funds shall insure that "hearings will be conducted by an impartial official (or officials) of the State agency." As amplified in the sections on criteria for administration of state plans, the "impartial official" is denominated as an official of the state agency who is responsible for conducting the hearing, and who "has not been involved in any way with the action in question." *Id.*, § 6300(h). The point is again made in the section officially interpreting the requirements of section 6200. "The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made." *Id.*, § 6400(c). Where an appeal is taken from the result of a "fair hearing" to the State hearing review authority, the Handbook regulations are insistent that that authority, too, should be "impartial." Again, "The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing. . . ." *Id.*, § 6400(f). And see *Id.*, § 6300(g).

The requirements laid down by this Court would seem satisfied by the aforementioned regulations. Having begun with the proposition that the Due Process Clauses forbid a trial before a judge who has a direct, personal, pecuniary interest in the outcome (*Tumey* v. *Ohio*, 273 U. S. 510 (1927)), this Court refused to hold partial a hearing officer merely on the ground that he was affiliated with the administrative body in question. *F.T.C.* v. *Cement Institute*, 333 U. S. 683 (1948). The regulation, excluding as impartial an official who had a prior contact with the decision under review, is mandated by the decision of this Court *In re*

Murchinson, 349 U. S. 133 (1955), which forbids the practice of any official sitting in judgment as to the propriety of his own actions or decisions.

8. DECISION ON THE RECORD: All of the above-mentioned procedural protections are easily circumvented unless the hearing officer is restricted in his decision to the record developed in a truly "fair hearing." Part IV, § 6300(o) has already been reviewed. Suffice it to recall at this point that this provision of the Handbook excludes from the hearing record all evidence and witnesses which the claimant has not had "an opportunity to hear or see. . . ." Section 6200(l) declares: "The *hearing officer's recommendations shall be based exclusively on evidence and other material introduced at the hearing.* The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing . . . will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time." (As amended by Handbook Transmittal No. 140 (Feb. 8, 1968).) [Emphasis added.]

Such a safeguard is consonant with the leading pronouncement by this Court requiring decisions to be based exclusively upon the record developed at the "fair hearing". In *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n. of Ohio*, 301 U. S. 292, 300-04 (1937), this Court held that reliance on tax values and other materials which had not been introduced into evidence "constituted a denial of due process." The Court observed: "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record. . . . This is not the fair hearing essential to due process. It is condemnation without trial." 301 U. S. at 300. This point was placed in perspective along with the other elements

of "fair play" by this Court in *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93-94 (1913):

> . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding.* (Emphasis added).

Finally, the requirement that decisions be upon the record, including the necessity of a statement of findings of fact and conclusions of law, reflects the decision of this Court in *Wichita R. & Light Co.* v. *Public Util. Comm'n. of Kansas*, 260 U. S. 48, 57-59 (1922).

9. JUDICIAL REVIEW: This final element is included as an "insurance policy" that all the others will be observed, or failing their observance, that a judicial remedy will be provided to save the citizen from the imposition of arbitrary or capricious behavior. And yet it is at this juncture that the Handbook regulations cease to be of effective assistance. Part IV, § 6400(i) suggests no more than that the availability of judicial review will depend upon the laws of the individual states. Amicus does not find the law to be thus settled by this Court.

With respect to questions of "constitutional fact," the judicial power of the courts can never be ousted. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 291 (1920). If the inherent power of review arising from the constitutional separation of powers extends to a *de novo* consideration of the questions of law, it may also have considerable sweep as to questions of fact. This has been

recognized as being true where a citizen's "fundamental rights" hang in the balance. In *Crowell* v. *Benson*, 285 U. S. 22, 56-57 (1932), this Court framed the question as follows:

> . . . [W]hether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whenever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

And see, *Stark* v. *Wickard*, 321 U. S. 288, 309-310 (1944). Where, as in the case at bar, the citizen's interest transcends the "fundamental" and assumes the most primitive posture, this Court should be loath to see any erosion upon the "inherent review power" of the judiciary.

II. THE NEW H. E. W. REGULATIONS CANNOT SERVE AS THE BASIS FOR A NON-CONSTITUTIONAL RESOLUTION OF THIS CASE, AND ARE UNCONSTITUTIONAL ON THEIR FACE.

A. The H. E. W. Regulations Cannot Serve as the Basis for the Court's Resolving This Case in a Non-Constitutional Manner.

The Department of Health, Education and Welfare has recently promulgated regulations which will supersede, in the categorical assistance programs, the New York fair hearing regulations found unconstitutional by the three-judge district court below. These new regulations provide, in pertinent part, as follows:

> "Effective October 1, 1969, a State plan for OAA, AFDC, APTD, AABD, or MA under the Social Security Act must provide that:
>
> > "(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance." 34 Fed. Reg. 1144 (January 24, 1969).

As of this writing, these regulations are binding upon the states October 1, 1969. However, amicus has reason

to believe that H. E. W. will delay their implementation until July 1, 1970. Whichever the case, these proposed regulations may not serve as the basis for a non-constitutional resolution of this case.

If the proposed regulations do not go into effect until July 1, 1970, the present federal regulations, which say nothing about the prior hearing (Handbook, Pt. IV, ch. 6000), and the current New York regulations are controlling. Both sets of regulations are unconstitutional.

If, on the other hand, implementation of the H. E. W. regulations is not delayed, or if the Court should find them to be nevertheless operative, it would be necessary to rule on them as law. "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78 (1943). The Court has recently held that this principle "applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." *Thorpe* v. *Housing Authority of Durham,* 393 U. S. 268, 282 (1969). Thus, as to the categorical assistance programs, it would be the new H. E. W. regulations, rather than the to-be-obsolete New York standards, which the Court would have to measure against the strictures of constitutional due process. In such a case, it would still be improper for this Court to resolve the case on the basis of the new regulations. This is so for several reasons.

Six of the original and intervening plaintiffs in this case are recipients of local general assistance, for which no federal funds are provided. *Kelly* v. *Wyman,* 294 F. Supp. 893, 902 (S. D. N. Y., 1968). The Social Security Act, and the regulations promulgated by the Department of Health, Education and Welfare pursuant to it, do not reach such purely local programs. Thus, the H. E. W. regulations

involved in this case have no binding effect upon the plaintiffs who are recipients of general assistance. As to them, it is necessary for this Court to reach constitutional grounds of decision.

Furthermore, though this case may bear some superficial resemblance to that presented the Court in *Thorpe v. Housing Authority of Durham, supra,* the issues presented here cannot be disposed of in a manner analogous to *Thorpe.* The question presented to the Court in that case was whether a tenant in a federally assisted housing project could be evicted without first being given notice of the reasons for his eviction, and some opportunity to reply to the evicting authority. While the case was pending before this Court, H. U. D. issued a circular which imposed a mandatory requirement upon all housing authorities to inform the tenant " 'in a private conference or other appropriate manner' of the reasons for eviction, and give him 'an opportunity to make such reply or explanation as he may wish'." 393 U. S. at 272-73. Given this H. U. D. circular, the Court found it unnecessary to reach the constitutional merits of the case, declining to consider whether the H. U. D. regulations would provide the petitioner with a hearing consonant with the requirements of due process. The reasons for the Court's refusal to reach the constitutional merits in *Thorpe* sharply distinguish it from the case now before the Court.

There was nothing in the H. U. D. circular which would have prevented the local authority from giving a tenant a full due process hearing prior to eviction. In contrast, the H. E. W. regulations involved in this case are, on their face, inconsistent with the requirements of due process. But even more critical is the fact that the Court in *Thorpe* recognized that in the case of a person about to be evicted from public housing, there need be no due process hearing before the housing authority, so long as the tenant

has been given notice of the reasons for the proposed e
tion. "Moreover, even if the Authority does not
vide such a hearing, we have no reason to believe
once petitioner is told the reasons for her eviction
cannot effectively challenge their legal sufficiency in w
ever eviction proceedings may be brought in the N
Carolina courts." 393 U. S. at 284. The fact that th
is opportunity for such *de novo* judicial review before
administrative action takes effect removes the const
tional necessity for a prior hearing before the age
Nickey v. *Mississippi*, 292 U. S. 393, 396 (1934), and clea
differenciates the plight of the public housing tenant fr
that of the welfare recipient. There is no alternative
portunity for *de novo* judicial review before welfare
withdrawn, and so the constitutional requirement of
process calls for a trial-type administrative hearing
fore the welfare department may reduce or withdr
assistance.

For the reasons which will be articulated below, ami
submits that the regulations promulgated by H. E.
compound rather than obviate the necessity of the Cou
reaching the constitutional merits of this case. Oth
wise, amicus fears that the regulations will serve as
basis for the unconstitutional deprivation of the rig
of welfare recipients in all of the fifty states.

B. The H. E. W. Regulations Are Inconsistent With the Fundamental Principles of Due Process and Are Thereby Unconstitutional.

1. The Regulations Promulgated by H. E. W. Permit and Encourage the States to "Suspend" Assistance Without Affording an Opportunity for a Prior Hearing.

The H. E. W. regulations state, in part, that:

> "When a fair hearing is requested *because of termination or reduction* of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal. . . ." 34 Fed. Reg. 1144 (Jan. 24, 1969) (emphasis added).

By confining the requirement that assistance be continued during the hearing process to merely terminations and reductions of assistance, the H. E. W. regulations permit and encourage the states to continue the practice of withdrawing public assistance without first affording an opportunity to be heard.

In administering the categorical assistance programs, both H. E. W. and the states have long distinguished between "termination" of benefits, and their "suspension." Termination or discontinuance of benefits refers to the permanent withdrawal of assistance, based upon an agency determination that the recipient is no longer eligible. In contrast, the "suspension" of benefits refers to the temporary withdrawal of assistance, usually when the agency is uncertain as to the recipient's continuing eligibility; benefits remain suspended until the question of eligibility is resolved, and the recipient is then either reinstated or terminated. Thus, New York regulations have provided that "suspension shall mean that all public assistance in the present program is stopped for a temporary period," and explain that "Public Assistance payments may be sus-

pended under the following circumstances: . . . (b) continuing eligibility is questionable and under investigation." N. Y. Official Compilation of Codes, Rules and Regulations, tit. 18, ch. II, § 351.22(c) (3). This distinction between termination or discontinuance, on the one hand, and suspension on the other, has been employed by many states, including not only New York, but also Arizona,[7] Connecticut,[8] Delaware,[9] Illinois,[10] and Mississippi.[11] The distinction is also recognized by H. E. W., for in its own regulations, specifying those agency actions with respect to which an aggrieved recipient may request a fair hearing, H. E. W. distinctly lists two such actions as "*suspension or discontinuance* of assistance in whole or in part. . . ." Handbook, Pt. IV, § 6300(c)(1) (emphasis added). Thus, in the administration of welfare, clear distinctions are drawn between the suspension of assistance, and its more permanent withdrawal. Against the background of this administrative practice, the omission of suspensions from the H. E. W. regulation becomes critical.

If the States are not required to continue assistance in both cases of proposed terminations and suspensions, any such regulation seeking to guarantee the constitutional rights of recipients will be thoroughly emasculated, as has occurred recently in the state of Mississippi. *Williams* v. *Gandy*, Civ. No. GC 6728 (N. D. Miss., filed June 9, 1967), was one of the earliest challenges to the practice of withdrawing assistance without affording opportunity for a prior trial-type hearing. The suit was settled when Mis-

7. ARS § 46-211A.

8. Conn. State Welfare Dept., Manual: Social Service Policies —Public Assistance § 370.3(A).

9. Del. Code Ann., tit. 31, § 508 (Supp. 1965).

10. Ill. Dept. of Public Welfare, Manual of Categorical Assistance, ch. 8200.

11. 3 Miss. Dept. of Public Welfare, Policies & Procedures for Administration of Public Assistance 7220-21.

sissippi agreed to promulgate what is one of the most liberal fair hearing regulations in the country. These regulations give the recipient 20 days in which to request a fair hearing from a proposed termination of assistance. If within this period the recipient makes a request for a fair hearing, his grant will be continued until the hearing has been held and a decision is reached. 3 Miss. Dept. of Public Welfare, Policies and Procedures for Administration of Public Assistance, 6101-03; State Dept. of Public Welfare, Bulletin No. 1335 (April 15, 1968). However, these same regulations refer separately to "termination" of the grant, as distinct from "changes in the amount of the grant," "suspension," and "withholding of payment." And in implementing the regulations, the Mississippi Department does not continue assistance for the 20 day period where "suspension" and "withholding" of the grant are involved. In this way, the state is able to continue its practice of withdrawing assistance without opportunity for a prior hearing, despite the existence of these handsome regulations.

The regulations proposed by Mississippi in response to the *Gandy* suit no more resolved the issues in that case than would the H. E. W. regulations solve the present controversy. Both are as tents pitched upon shifting sands. Neither afford any more than illusory protection in an area where the Constitution requires safeguards that are meaningful in actual fact.

2. The H. E. W. Regulations, Requiring the Continuation of Assistance Only in Cases Where the Request for a Hearing Is Based Upon Issues of Fact or of Judgment, Permit and Encourage the Arbitrary Denial of Due Process Rights.

Under the terms of the H. E. W regulation, it is not enough for the recipient whose assistance is about to be reduced or withdrawn to merely request that he be given

a fair hearing in order to effect the continuation of his benefits during the period of the appeal. For the welfare department is given the duty of then determining, on the basis of type of issue involved in the appeal, whether the recipient's assistance is to be immediately reduced or withdrawn, or whether the case qualifies for the continuation of benefits during the fair hearing process. While the standards given the welfare department for making this critical judgment are probably not in themselves invalid, they are such that not even the most talented and well-meaning welfare officials could either understand or meaningfully follow them. The consequence of vesting such effectively unfettered discretion is to encourage what is certain to be an arbitrary and costly abridgement of the due process rights of recipients.

The H. E. W. regulations provide, in part, that:

> "When a fair hearing is requested because of termination or reduction of assistance, *involving an issue of fact, or of judgment relating to the individual case*, between the agency and the appellant, assistance will be continued during the period of the appeal . . ." 34 Fed. Reg. 1144 (Jan. 24, 1969) (emphasis added).

There are several constructions which might be given to the emphasized language. The most obvious meaning is also the most objectionable—namely, that the local welfare department may discontinue the assistance of a recipient, despite his request for a fair hearing, where the department is unable to find any issues of fact or of judgment involved in the appeal. Such an interpretation would in effect allow the department to conclude that its own case against the recipient was so clear and one-sided that no "issues" were presented, despite the fact that the recipient's timely request for a fair hearing entitles him to administrative review. Such an interpretation of the regulation, which would permit the very authorities who are

meant to be restrained by the requirements of due process to make their own determination of what due process protections are warranted, would be a grotesque perversion of a fundamental constitutional principle, and would render it a practical nullity.

A more reasonable meaning to be given the language of the regulation is that it is meant to represent a loose translation of the distinction often drawn in administrative law between legislative and adjudicative facts. See part I-C, *supra*. The inclusion of this language in the regulation would then appear to merely repeat the doctrine that a recipient has a right to a prior trial-type hearing only in cases involving issues of adjudicative fact. While this is a satisfactory doctrine as a doctrine, its practical application in the welfare area by local welfare authorities only serves to invite its distortion and the consequent denial of a *prior* hearing in cases where individual recipients are constitutionally entitled to one.

As amicus has suggested in Part I-C, *supra*, in every case in which a recipient of public assistance contests a threatened reduction, suspension or termination of his previously determined statutory entitlement, the proceeding is inherently and fundamentally adjudicative, even when the sole issue raised is the legality of the agency regulation or policy. Thus, the distinction is at best irrelevant in the context of welfare, for if properly drawn, the result would be that benefits would be continued in virtually every case in which a recipient seeks to contest a threat to his entitlement.

The difficulty is that the distinction is not going to be properly drawn by those charged with making it, with the result that many who are constitutionally entitled to a *prior* hearing will not receive one. Welfare officials have never had occasion to draw any distinction between the types of fact involved in an appeal. Davis has noted that,

as regards the "distinction between legislative and adjudicative facts . . . the line is sometimes difficult or impossible to draw," and that "in the borderland the distinction often has little or no utility." 1 K. Davis, Administrative Law Treatise, § 7.02 at 414 (1958). If it is true, as Davis suggests, that even "the courts have seldom been articulate about the cardinal distinction between adjudicative and legislative facts . . ." (*Id.* at § 7.06, p. 429) it would be unreasonably optimistic to expect welfare officials who have never before been vested with the duty of drawing such distinctions to do so with any precision or consistency. Perfectly administered, the result would be the continuation of assistance during the appellate process in no less than 100% of the cases where benefits are threatened. Imperfectly administered, as cannot help but be the case, the result is the certain withdrawal of benefits from the needy by means which violate their fundamental constitutional rights.

A regulation which incorporates standards that cannot be either interpreted or meaningfully applied by officials who are constitutionally bound by them is pernicious and invalid, for the actions which those officials purport to take under the guidance of such standards cannot be other than arbitrary and capricious. "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict." *Jones* v. *S. E. C.*, 298 U. S. 1, 24 (1936).

3. The H. E. W. Regulations Shift to the Recipient the Critical Burden of Justifying a Prior Hearing, and Thereby Erect an Impermissible Barrier to the Exercise of His Due Process Rights.

As noted above, the burden of distinguishing "legislative" from "adjudicative" facts has frequently proved "difficult or impossible to draw" even when that task was assumed by appellate judges. The new H. E. W. regulation would turn the task over to low echelon bureaucrats in the fifty-one welfare establishments. As an abstraction, this might not offend. But when a constitutional right as enunciated by this Court (*Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908))—protective of a disadvantaged citizen's most primitive interest, "the very means to subsist" (*Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969))—is made the unwilling captive in such a free-wheeling delegation, the encroachment upon the "essence of due process" is hardly petty.[12] *Garfield* v. *Goldsby*, *supra* at 262. Within this administrative nightmare, the welfare recipient is left to shift for himself in the hope that he can frame his request for a hearing in such an artful manner so as to convince the local welfare office that his is a case involving only "an issue of fact, or of judgment". The mocking travesty of placing this burden upon a class of educationally and economically

12. As amicus has demonstrated to this Court at some length above, the fundamental rule of constitutional due process is that a person aggrieved by an administrative action is entitled to a trial-type hearing before that action becomes effective. *Garfield* v. *Goldsby*, 211 U. S. 249 (1908). The only exceptions to this rule of a prior opportunity to be heard are those in which the state can demonstrate a peculiarly urgent and emergency need for immediate summary action. Summary action being the rare exception to the usual rule, the burden lies with the government of justifying its need for such an extraordinary procedure. Comment, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L. J. 1234, 1240 n. 26 (authorities collected) (1967). The H. E. W. regulation, by shifting the effective burden to the recipient, violates this fundamental principle of due process.

disadvantaged citizens should be sufficient to constitutionally condemn this regulation even if the test were analogous to that applied in *Rochin* v. *California*, 342 U. S. 165, 172 (1952). The inability of a grade-school dropout to frame even a simple "request for a hearing" has been fully recognized by the Department which now seeks to hold such persons to the standards of code pleading. A contrast between the silence of the new "prior hearing" regulation, and the Handbook provisions governing a request for a hearing is disturbing, to rest the objection of amicus in the most restrained language.

"A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority." Handbook, Part IV, § 6300(b). The administering state agency is admonished that it is not to limit or in any manner interfere with the freedom of the claimant in making such requests. On the contrary, it is to create an atmosphere designed to facilitate the submission and processing of such requests, and even offer assistance in preparing the claimant's case. *Ibid.*[13] All of these safeguards, aptly reflecting the Department's appreciation of the welfare client's limited capacity to intone the magic word at the magic moment, existed when the scope of the fair hearing admitted of no artificial limitations.[14] And yet this is the same Department which

13. In addition, the Handbook criteria require that the claimant be given written notification, and to the extent that it is possible in a given case, oral explanation of the right to and procedure for requesting a fair hearing at the time of his initial application. Such written and oral notice must be repeated at the time of any agency action adversely affecting an established grant. Handbook, Part IV, § 6300(j).

14. As noted above the opportunity for a fair hearing expressly included: "Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies pro-

would now condition fulfillment of this Court's due process command on the ability of the blind, the aged, the infirm, the untutored minor, and the hungry to complete an unescorted journey through the eye of an administrative needle.

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). It is decisive in this case. The recipient may have a very short time in which to request a fair hearing before he suffers the loss of his benefits. Those states which have been ordered by a court to continue assistance until there has been an opportunity for a fair hearing, have held open the opportunity to request a fair hearing for only a very brief number of days. Thus, the period in Michigan is ten days, *Moore* v. *Houston* (Civ. No. 104435, Mich. Cir. Ct., Wayne County, consent judgment entered Nov. 1, 1968), and in New York, seven days (*Kelly* v. *Wyman*, 294 F. Supp. 893 (S. D. N. Y., 1968)). Such short time periods are likely to appear in other states as well, as more states are judicially compelled to abide by the norms of due process. It is in this perhaps short period of time that the recipient must put together his critical request for a prior hearing.

Even in states where the time period may be more generous, the burden is overwhelming. There is no right to appointed counsel at this stage of the process, the proposed regulations only granting this right for the fair hearing itself. 34 Fed. Reg. 1144 (Jan. 24, 1969). But even the assistance of counsel might be of little value, for though

---

mulgated under the law, if the claimant is aggrieved by their application to his situation . . ." Handbook, Part IV, § 6300(c)(2). Under the former Handbook scheme, unfettered cooperation between the aggrieved recipient and the agency was viable for at the "request" stage their eventual difference was not a critical factor. Under the new regulations, the "request" stage is critical for it is now adversary in nature.

the recipient has been given notice of the reasons for the proposed reduction or withdrawal of assistance, there is not until the fair hearing an adequate opportunity to discover the specific basis for the Department's intended action. Without such a basis, it is cruelly unjust to expect the recipient to demonstrate in his request for a fair hearing that there are in fact very specific issues of fact and/or judgment involved, so as to preserve his benefits during the extended hearing process. Such a regulation requires the recipient, under penalty of sacrificing his constitutional rights, to know long before the fair hearing what it is the very function of the hearing to inform him of. And even were it so possible for the recipient to obtain all of this information at the time he must request the hearing, it is extremely unlikely that he is versed or subtle enough to assemble his case so as to satisfy the burden rested upon him by this regulation.

In short, it is altogether clear that the H. E. W. regulation, by upending the accepted principle of due process, places upon the welfare recipient a burden which he cannot possibly sustain, with the result that he is deprived of his constitutional right to be heard before the bare means of subsistence are taken from him. Such a regulation is a pitiful alternative to the breastwork of protection required by the Constitution.

4. The H. E. W. Regulations Permit the States to Reduce or Withdraw Assistance Until Such Time as the Recipient Requests a Fair Hearing, Thereby Depriving Him of His Right To Be Heard Before His Statutory Entitlement Is Impaired.

The H. E. W. regulation explicitly states that it is permissible for the state to reduce or withdraw asistance immediately, and for as long a period as it takes the recipient to make a timely request for a fair hearing. The regulation states, in part, that:

> When a fair hearing is requested . . . assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (*If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.*) 34 Fed. Reg. 1144 (Jan. 24, 1969) (emphasis added).

Because the regulation so sanctions the withdrawal of assistance prior to and without the opportunity to be heard, it fails to satisfy the basic due process requirement that there be an opportunity to be heard *before* the administrative action becomes effective. The fact that assistance may be reinstated once a request for a hearing has been made does not alter the very real fact that the recipient may have been deprived of the very means of survival for a period of perhaps several months. Such a procedure is no less offensive to the basic norms of due process than were the recipient only reinstated after the fair hearing. The difference is at best one of a few months; neither constitutional principles nor human needs are so calibrated.

The Federal Handbook does not specify the amount of time the states must allow the recipient to request a fair hearing. The Handbook merely requires that a "reasonable time" be allotted. Handbook, Pt. IV, § 6300(d). The states have all interpreted this requirement so as to give aggrieved recipients a lengthy time in which to make such a request. California is perhaps the most generous, requiring only that the request be filed "within one year after the order or action complained of." Cal. Wel. & Inst. Code, § 10951. Most of the states typically allow a period of two to three months. A few states, as has already been noted, have considerably shorter periods, but these are states which have been judically compelled to continue assistance until there has been an opportunity for a hearing. None of these states was permitted to adopt the

procedure, sanctioned by this H. E. W. regulation, of withdrawing assistance at once, and only continuing it from the time a fair hearing request was entered. Had they been allowed to do so, it is unlikely that they would have so reduced the period for making a timely request. Consequently, in considering the effect of the H. E. W. regulation, it is not unreasonable to assume that states would continue to retain the two to three month request period, and that assistance might be withheld for up to 90 days in cases where recipients operated within the state-established time periods.

To contend that such an extended withdrawal of assistance, before there has been an opportunity to be heard could be cured by the tardy recipient himself is to ignore the hard reality that welfare recipients are not only poor and unsophisticated, but that they are easily confused and intimidated by the complexities of the modern day, red-taped world. They do not read all of the notices spun out for their benefit; it may be a week or more before they realize that the welfare check is not just late this month but somehow missing; if they know where to go to talk about the sudden turn in their lives, it may be even more days before the bus or subway fare to make the trip is scraped together. This is not mere fiction. For what other reason would the vast majority of the states, in interpreting the federal requirement that a "reasonable" time be allowed, have given recipients at a minimum two months in which to appeal from a loss in benefits?

The length of time for which a recipient's benefits might be withheld under the H. E. W. regulations is further compounded by the fact that a state which pays welfare grants on a monthly basis may "reinstate" the recipient to the rolls immediately upon receiving his timely request for a hearing, though not actually resuming the critical flow of assistance until the next pay period arrives, perhaps

additional full month away. Nothing in the regulation would prevent such added delays, nor is there any suggestion that the state must make retroactive payment at the time it reinstates the recipient for the period during which benefits were withheld.

This H. E. W. regulation directly conflicts with the due process requirement that assistance be continued until there has been an opportunity for a hearing. To hold otherwise is to permit the emasculation of basic constitutional safeguards which were designed to protect all citizens, including the poor, against the arbitrary action of government. This Court recognized more than thirty years ago that

> "if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

Jones v. *S. E. C.*, 298 U. S. 1, 24-25 (1936).

CONCLUSION.

For the foregoing reasons, it is the prayer of amicus that the judgment entered by the court below be modified, and as so modified, affirmed. In so doing, this Court should declare that the "right vs. privilege" dichotomy is contrary to the rule that all governmental action must be subjected to the test of due process. This Court should further declare that every citizen has a fundamental personal interest in survival at a subsistence level, and that government may never jeopardize or impair this primitive in-

terest without first satisfying the most stringent standards of fairness. The Court should hold that welfare benefits may never be terminated, suspended, reduced, conditioned or otherwise withdrawn until the aggrieved recipient has had an opportunity for an adequate hearing, which must include, at a minimum, these constitutionally required elements: notice; discovery; the right to counsel; an oral hearing; confrontation and cross-examination; the right to present evidence and make oral argument; an impartial tribunal; decision on the record; and judicial review. In conclusion, this Court should advise that because the Constitution requires a full, trial-type hearing before a welfare recipient's statutory entitlement may be adversely affected, a dual hearing system of the type approved by the court below cannot satisfy the requisites of due process unless the prior hearing is itself the full and fair hearing.

Dated, Chicago, Illinois, August 30, 1969.

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No. 62

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of U. S. as amicus curiae.
(filed on Sept. 10, 1909.)

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OCT 9 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 62

JACK R. GOLDBERG,
Commissioner of Social Services of the City of New York,

Appellant,

—against—

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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INDEX

PAGE

ARGUMENT 1

CONCLUSION 7

AUTHORITIES CITED

18 N.Y.C.R.R., Section 351.26(b) 3, 4, 5, 6

N.Y. Civil Practice Law and Rules, Article 78 4

In the

Supreme Court of the United States

October Term, 1969

No. 62

Jack R. Goldberg,
Commissioner of Social Services of the City of New York,

Appellant,

—against—

John Kelly, Ruby Sheafe, Teresa Negron, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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(1)

The briefs submitted by appellees and the *amicus curiae,* National Institute for Education in Law and Poverty, while bristling with case citations, ultimately rest on nothing more than their claims that general guidelines to due process developed under other factual patterns should be applied here. Appellant must face the same problem. There are no cases decided by this Court which require that the constitutional standards of due process of law appropriate to criminal trials, civil suits at common law, or in equity or under statutory right, or in a variety of administrative proceedings conducted by regulatory agencies should necessarily be applied to determine the question of whether or not someone's welfare payments should be terminated. Appellees,

however, faced with this problem attempt to weight their argument by a subjective depiction of the relationship between the welfare client and the caseworker.

The client is conceived by appellees as the honest but ineffectual, inarticulate victim (Br. 34). The caseworker is characterized as suspicious (Br. 31), hostile (Br. 33), untrained (Br. 34), punitive, moralistic (Br. 36), domineering (Br. 36), politically motivated (Br. 37), unreliable and capricious (Br. 41), whose decisions rest on whim or surmise (Br. 42). Investigation might well establish, contrary to appellees' charges, that generally caseworkers are well trained, dedicated, conscientious and sympathetic to the needs of their clients. Even so, some mistakes will occur and the client under the regulations and procedures challenged here is given the means to prevent actions adverse to his interest. There can be no doubt moreover that, while the great majority of welfare beneficiaries are tragic victims of age, poor health, unemployment, broken marriages, racial discrimination and other social ills, fraud and misrepresentation are not unknown or uncommon among the millions who claim welfare benefits. In short, it is incorrect to assume that the welfare system is exposed solely to the just demands of the virtuous poor and customarily responds with callous indifference.

Under these circumstances a balancing of interests is warranted. If the welfare system suffers from extensive overpayments to persons who are ineligible, the general public is damaged; there will be a loss of confidence in the system; and, in response to taxpayers demands, legislators may well cut back further on allocations for welfare which are presently at a minimal standard. On the other hand, appellant does not deny that individual hardship can result from an arbitrary, uninformed termination of benefits.

In response to these needs, procedures designed to protect the state against fraud and waste and at the same time protect individual welfare recipients against arbitrary termination of their benefits were instituted in New York State and New York City. As applied in the City these procedures did not include a trial type hearing with witnesses and cross-examination. Appellees claim and the court below agreed that this omission was constitutionally fatal. Yet the procedures in question were not designed to stop the flow of information between the Department of Social Services and its clients. It was an underlying premise throughout the implementation of these new procedures that communication was essential but confrontation, as in a trial, was not.

Under New York City's Procedure No. 68-18 (Exhibit following p. 148a), which was issued to implement 18 N.Y.C.R.R., Section 351.26 (b), the caseworker must discuss with the client the reasons for a proposed suspension or discontinuance of assistance. After discussing the matter with the client, if the caseworker concludes the client is no longer eligible for assistance, he forwards the case record to a unit supervisor for review. Only if the unit supervisor agrees with the caseworker's recommendation will the seven day notice of intent to suspend, or discontinue assistance be sent to the client. Thus the client is informed prior to the receipt of the formal notice that his eligibility is in doubt and has an opportunity in a conference with his caseworker to show that he remains eligible if that is the case.

After receipt of the written notice, which again states the reasons for the proposed termination, the client may request a review and, with the aid of counsel, if desired, he may submit any written data in support of his claim of continued eligibility. The case record and any material submitted by the client is then examined by a review officer. Assistance continues throughout this process until the re-

view officer makes his determination. Thus there are three separate examinations of the question of eligibility before any action adverse to the client is taken. The caseworker discusses the problem with the client; the unit supervisor reviews the record and the caseworker's recommendation; and finally the review officer makes a third examination of the matter including consideration of anything submitted by the client or his counsel. Finally, if the review officer determines the client is not eligible, the client is notified and advised of the reasons for his termination, and in the same notice he is told (Form M-3h to Procedure No. 68-18 following p. 148a):

> "If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway, New York, N. Y. 10007, Telephone Number 488-6550."

The validity of the Fair Hearings is not in question. If the client is restored to the welfare rolls after a Fair Hearing, any benefits wrongfully withheld are paid up retroactively to the date of termination (322a-323a). In New York the matter need not stop at the Fair Hearing stage. If the client is unsuccessful, the decision of the hearing officer may be reviewed in New York State Supreme Court under Article 78 of the New York Civil Practice Law and Rules.

The focus of this case then is narrow. Benefits may be terminated under Section 351.26 (b) after the review officer's decision. Statistically it is predictable that there will be some percentage of cases that a review officer will terminate only to have his decision reversed after a Fair Hearing. In the brief experience under New York City's procedure the number of reversals of termination decisions

had dropped to three per month or less (358a-363a). A system that works this well, where the client is protected by the safeguards outlined above, should not be deemed constitutionally defective on its face.

(2)

The court below responded more strongly than is required constitutionally in striking down Section 351.26 (b). In all likelihood this result was influenced by appellees stress on the difficulties experienced by some of them resulting from erroneous termination of benefits before any prior review procedure was instituted. In *Kelly* v. *Wyman,* the complaint was filed on January 29, 1968. In *Shaefe* v. *Wyman,* the complaint was filed on February 29, 1968. In *Negron* v. *Wyman,* the plaintiff intervenors filed their notice of motion to intervene on June 17, 1968. All of these cases are consolidated on this appeal but only the last case was brought after the regulations under attack become effective in New York City.

The new regulation, §351.26, was first promulgated by the New York Department of Social Services to become effective on March 1, 1968. This regulation was the predecessor of what is now §351.26(a). It could not be implemented in New York City on that date and negotiations followed between the City and the State concerning an amendment acceptable to the City. Subsequently on April 26, 1968 the State repealed §351.26 and issued a new regulation consisting of §351.26(a) and (b) (125a-130a). The City elected to proceed under §351.26(b) and submitted to the State a proposed procedure for implementation of the new regulation. After approval of the City's proposal (Procedure No. 68-18) the new regulation became effective in New York City on May 27, 1968 (145a-148a). Thus, whatever the experience of the plaintiffs may have been,

none of the original plaintiffs and only a few of the plaintiff-intervenors had any experience under the new procedures. Their respective claims are discussed in the affidavit of Merrill Charlton (322a-330a).

The new system proved to be effective. Erroneous decisions of caseworkers were corrected by the review officer. The number of reversals of termination decisions after Fair Hearings dropped dramatically (320a-321a, 358a-363a). Nevertheless, the District Court found §351.26(b) to be constitutionally inadequate. More safeguards can always be imposed but there should be a showing of substantial inherent risk to constitutionally protected rights before a new system that is working well is discarded. It may be innovative. It may not be traditional. Still it is not for those reasons defective. Section 351.26(b), as implemented in New York City by Procedure No. 68-18, shows a persistent concern for individual rights. The client is consulted. Any facts he has can be brought forth. Not less than three levels of authority review the case prior to termination. There are strong insulating safeguards in this procedure to protect the client against arbitrary and uninformed action. The basic requirements of due process under these circumstances are met. The decision below, therefore, was not required by relevant constitutional standards.

CONCLUSION

The decision below should be reversed. The injunction should be vacated. Appellant's motion for a summary judgment should be granted and the complaints should be dismissed.

October 9, 1969

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Nos. 62 and 14

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellants,

—v.—

JOHN KELLY, *et al.*,

Appellees.

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN REPLY TO THE UNITED STATES AS *AMICUS CURIAE*

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

ARGUMENT:

I. The Constitutionality of Neither the Social Security Act Nor the H.E.W. Regulations Thereunder Is in Question in This Case 2

II. The Official Expressions of Federal Policies in the H.E.W. Regulations Accommodate and Endorse the Due Process Requirements Invoked Here 6

III. The "Advance Notice of Questions" Requirement Is Not an Innovative Experiment Requiring Modifications of Prior Practice or Time for Assessment 9

IV. The Government's Invocation of the "Right-Privilege" Doctrine and the OASDI Program Provides No Intelligible Standard for Determining the Requirements of Due Process 13

V. A Hearing Before Termination Does Not Impose Unusual or Undue Fiscal or Administrative Burdens 17

CONCLUSION 23

APPENDIX:

District Court Brief of the United States as *Amicus Curiae* in *Goldberg* v. *Kelly* 1a

Table of Authorities

PAGE

Cases:

Bailey v. *Engleman*, Civ. No. 654-69 (D.N.J. Sept. 22, 1969) 18
Blumenthal v. *F.C.C.*, 318 F. 2d 276 (D.C. Cir. 1963) 17

Coleman v. *Ott*, Civ. No. 68-1169-C (D. Mass. Jan. 1969) 18

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Garfield v. *Goldsby*, 211 U.S. 249 (1908) 16-17
Gonzales v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964) .. 6, 17
Greene v. *McElroy*, 360 U.S. 474 (1959) 6

Hannah v. *Larche*, 363 U.S. 420 (1960) 14

King v. *Smith*, 392 U.S. 309 (1968) 4, 17

Machado v. *Hackney*, 299 F. Supp. 644 (W.D. Tex. 1969) 18
Miller v. *Zoeller*, Civ. No. 69-C-2 (W.D. Wisc. Jan. 20, 1969) 18

Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 17

Oestereich v. *Selective Service Local Bd. No. 11*, 393 U.S. 233 (1968) 9

Panitz v. *District of Columbia*, 112 F. 2d 39 (D.C. Cir. 1940) 5

PAGE

Phillips v. *Commissioner*, 283 U.S. 589 17

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Shaughnessy v. *United States*, 345 U.S. 206 (1953) 6
Sims v. *Juras*, Civ. No. 69-238 (D. Ore. Aug. 21, 1969) 18
Snaidach v. *Family Finance Corp.*, 395 U.S. 337 (1969) 16

Willner v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) 17

Statutes:

42 U.S.C. §302(a)(4) 3
§302(a)(5) 4
§402 15
§403(b) 15
§405(g) 15
§432(c) 15
§602(a)(4) 3
§602(a)(5) 4
§606(e)(1) 6
§1202(a)(4) 3
§1202(a)(5) 4
§1352(a)(4) 3
§1382(a)(4) 3
§1382(a)(5) 4

PAGE

Regulations:

H.E.W. Handbook, Pt. IV

§2000 *et seq.* 10
§§2000-2999 6
§2220(5)(a) (March 18, 1966) [now §2200(e)(1)] 11, 12
§2220(5)(b) (March 18, 1966) [now §2200(e)(2)] 11
§2230(5) (March 18, 1966) [now §2300(e)(1)] 12
§2230(5)(a) (March 18, 1966) [now §2300(e)(5)] 12
§2230(5)(c) (March 18, 1966 [now §2300(e)(2)(3)] 11, 12
§2230(5)(d) 12
§2230(5)(e) (March 18, 1966) [now §2300(e)(2)] 12
§2300(d)(5) 9, 11, 12, 13
§5514(2) 7
§6100 6
§§6200-6400 3
§6200 6
§6200(b) 4
§6200(k) 8
§6500(a) 8
§6500(b) 3, 14, 17

20 C.F.R. §404.910 15
§404.968(a) 15

45 C.F.R. 202.3 5
203.1 5
205.10 ..... 4, 5, 8, 14
205.20 5
220.25(a) 5

PAGE

Calif. Social Services Manual, Section 44-325.43 10

Mississippi, Manual Sec. F, pp. 6101-6103 21

18 N.Y.C.R.R. §82.1 13
§351.22 13
§351.23(a), (b) 13

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Mississippi Dept. of Welfare, Division of Statistics 20

New York City Dept. of Soc. Serv., Review Section Reports for Quarter Ending Mar. 31, 1969, and Months Ending Apr. 30, 1969 and May 31, 1969 19

PAGE

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Welfare in Mississippi, A Report of the Mississippi State Advisory Committee to the United States Commission on Civil Rights (February 1969) 20

IN THE

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Nos. 62 and 14

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Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN REPLY TO THE UNITED STATES AS *AMICUS CURIAE*

Appellees in No. 62 and Appellants in No. 14 jointly submit this brief in reply to the Brief for the United States as *Amicus Curiae,* in which the Government now argues that the currently applicable H.E.W. policies, said to represent the "expert judgment of the Secretary" on "cogent policy considerations," Gov. Br. 23, 24, should control the constitutional standards for termination of welfare payments. This position stands in sharp contrast with, at times in opposition to, the exposition of the United States as *amicus curiae* below in *Goldberg* v. *Kelly* of the very same federal regulatory policies invoked here and of their relevance to constitutional standards. We have therefore reprinted in full the Government's earlier exposition in the Appendix to this Reply.[1]

I.

Let us first put aside the Government's intimation that this constitutional attack on state administrative practices draws into question, in some undefined manner, the "fair hearing" provision of the Social Security Act or the currently applicable H.E.W. regulatory policy. The constitutional validity of neither is under review in this Court. The challenged terminations of public assistance benefits were effected by state and local administrators under state law and administrative policies. No federal statute or regulation requires (or, as we shall establish, encourages) such terminations without a hearing. It is

[1] The brief *amicus curiae* of the United States in *Goldberg* v. *Kelly* was submitted to the three-judge district court in October, 1968, in response to that court's request to the Attorney General for the views of the United States.

state administration of these programs generally which entails the eligibility problems and abuses necessitating constitutional accountability. As the United States said and reiterated in its *amicus* brief below:

> "As for the AFDC program, whether the plaintiff-clients or the defendant-State and local agency should prevail in this case, it appears, as will be discussed below, that there will be no violation of Federal requirements." Reply App. 2a.

Our attack on state regulations does not question the constitutionality of the "fair hearing" provisions of the Social Security Act, 42 U.S.C. §§302(a)(4), 602(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).[2] Although Congress, as is its wont in such procedural matters, did not attempt to define what was "fair" over the entire spectrum of disputes between an applicant or recipient and the agency, no inference may be drawn therefrom.[2a] All that can fairly be said from the statutory command of a "fair hearing" is that Congress intended the customary requirements of fairness embodied in procedural due process to govern welfare hearings. H.E.W. has so interpreted the term in specifying at length the manner in which the states must conduct the hearing. H.E.W. Handbook, Pt. IV, §§6200-6400. H.E.W.'s regulation providing continued federal participation where the state maintains assistance pending the hearing decision, H.E.W. Handbook, Pt. IV, §6500(b), ob-

[2] These provisions are applicable to state programs for Old Age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled and Aid to the Aged, Blind and Disabled, respectively.

[2a] In the one instance in which Congress enacted requirements dealing solely with recipients, the Work Incentive Program, it required a hearing prior to withdrawal of aid for refusal to accept employment. 42 U.S.C. §633(g).

viously is premised on an interpretation of congressional intent not inconsistent with a prior "fair hearing."[3]

Moreover, the failure of the currently applicable federal regulations to *require* a prior hearing as a prerequisite to approval of a state plan cannot be construed as a constitutional judgment of the Secretary or a constitutional deficiency in the federal regulations. The H.E.W. procedural regulations at any point in time represent the *minimal* federal requirements for continued funding of a state welfare program. Reply App. 2a. Because of the exceedingly difficult problems of administrative enforcement of federal requirements, cutoff of federal funds to the states being the only sanction, H.E.W. has not taken an expansive view of its statutory powers generally, see *King* v. *Smith*, 392 U.S. 309, 337-38 (1968), or specifically of its vague authority to require "proper and efficient" methods of administration. 42 U.S.C. §§302(a)(5), 602(a)(5), 1202(a)(5), 1352(a)(5), 1382(a)(5).[4] As a result, federal regulatory pol-

[3] The Government alludes to, but does not quite rest upon, a literal reading of "a fair hearing . . . to any individual whose claim for aid . . . is denied" to obliterate any distinction between applicants and recipients of aid. Such a literal reading would contradict H.E.W.'s own settled construction of the statute requiring a "fair hearing" for any agency action adversely affecting an individual's situation, monetary and non-monetary, H.E.W. Handbook, Pt. IV, §6200(b), and also contradict H.E.W.'s interpretation evinced in its prior hearing regulation, which does, after all, implement the statutory "fair hearing" provision. 45 C.F.R. §205.10. This reading would also seemingly require persons terminated to reapply for aid as a prerequisite for the hearing, a practice that H.E.W. has found offensive to the federal act. See *In the Matter of The Conformity of the Louisiana Plan for Aid to Dependent Children Under Title IV of the Social Security Act*, in P. DODYK, CASES AND MATERIALS ON LAW AND POVERTY 131-136.

[4] H.E.W.'s skittishness under this provision may be seen not only in the postponement of the effective date of the prior hearing regulation, but also in a similar postponement of the regulation re-

icy often does not reflect vigorous pursuit of the central purpose of the federal programs—protection of the economic security of individuals in need. Nonetheless, the states are at the very *minimum* obliged to obey the dictates of constitutional standards. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). This is so whether or not these dictates are embodied in the applicable federal regulations. While H.E.W. may not, of course, continue to fund a state program found to be administered in an unconstitutional manner, *Shapiro* v. *Thompson, supra,* like other administrative agencies it does not possess, nor has it assumed, the power to resolve disputed constitutional questions that have not been authoritatively settled in the courts, *Engineers Public Service Co.* v. *S.E.C.*, 138 F. 2d 936 (D.C. Cir. 1943), *judgment vacated and case remanded as moot*, 332 U.S. 788 (1947); *Panitz* v. *District of Columbia*, 112 F. 2d 39 (D.C. Cir. 1940), though it quickly moves to implement such decisions by regulations, *e.g.*, 45 C.F.R. §203.1 (Aug. 8, 1968); 45 C.F.R. §202.3 (May 29, 1969). H.E.W. has not purported to exercise such a power here. As the Government succinctly explained below, "it does not appear that the validity of the Federal policies under either the Federal statute or the Constitution is in issue here." Reply App. 3a. The identical federal policies prevail today.

The standards which were left by Congress for judicial determination in accordance with general principles of procedural due process can mean no less in welfare hearings

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quiring provision of attorneys at fair hearings, 45 C.F.R. §§205.10, 220.25(a) (as amended Aug. 19, 1969), and in the repeal, in effect, of the regulation requiring use of the declaration method to establish eligibility, 45 C.F.R. §205.20 (Jan. 17, 1969).

than in customary administrative decision making. See *Goldberg*, Br. for Appellees 43-45. Among these standards is a well-founded and established distinction between initial denial and revocation of statutory rights, entitlements or privileges, *Gonzales* v. *Freeman*, 334 F. 2d 570, 575 (D.C. Cir. 1964); *Shaughnessy* v. *United States*, 345 U.S. 206 (1953); *Greene* v. *McElroy*, 360 U.S. 474 (1959), which is as valid and recognized in the welfare context as in all others.[5]

II.

The Government's repeated assertion that the Secretary has confronted and acted upon "cogent policy considerations" in opposition to prior hearings cannot be reconciled with the Secretary's official expression of federal policy in

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[5] By hypothesis the recipient of aid is far more dependent and vulnerable than the applicant. The recipient has been found fully eligible, which means without resources or income, employment or opportunity for employment. Such persons must yield whatever resources they come by to the welfare department. They therefore await and expect the bi-weekly check to cover the most immediate of needs—shelter, food and clothing. They are also more exposed to arbitrary treatment stemming from their ongoing personal relationship with a caseworker who administers their subsistence grant.

Federal and state welfare regulations well recognize the difference. H.E.W. makes clear that aid may not be revoked without an administrative finding, supported by clear evidence, of ineligibility, H.E.W. Handbook, Pt. IV, §§6100, 6200; aid, however, may be denied unless the applicant establishes eligibility, H.E.W. Handbook, Pt. IV, §§2000-2999. The statute also provides that the applicant for aid may receive temporary assistance during the 30-day period allowed for investigation of eligibility, 42 U.S.C. §606(e)(1). The terminated recipient deemed ineligible most often may not reapply or receive emergency assistance, but rather must wait the far longer and more uncertain period for the fair hearing to re-establish eligibility. The situations are not, as the Government implies, comparable.

the H.E.W. regulations. These regulations, at the time of the Government's brief below and now, both accommodate and in large part endorse the due process standards relied on here. Upon exposure of the due process claim in these cases, but before any decision, H.E.W. added to the fair hearing provisions authorization for states to continue aid pending the "fair hearing," without loss of federal matching funds. Those funds are now available for all attendant expenditures, including benefits paid during the interim period. H.E.W. Handbook, Pt. IV, §6500(b). As the Government explained below, Reply App. 3a, federal matching provisions often go beyond coercive federal conditions, in order to encourage, hardly discourage, a specified method of administration.[6] This currently applicable federal policy embodied in the matching provision hardly bespeaks a considered administrative judgment that prior hearings impose an unwarranted fiscal burden on federal revenues or create a likelihood that "large numbers of ineligible persons [will or might] enforce a right to receive benefits for substantial periods of time." Gov. Br. 26.[7] At the same time, H.E.W. also expanded from 30 to 90 days the federal matching periods in which the local agency investigates ineligibility and conducts its own termination proceedings. H.E.W. Handbook, Pt. IV, §5514(2). Being at least equal to the 60 days theoretically allowed for the state "fair hearing," the enlarged period certainly accommodates a

[6] Statutory matching provisions are often designed to accomplish the same purpose. New services provided by Congress for AFDC recipients in January 1968 were attended by liberal matching provisions to encourage the states to make use of these measures. 113 Cong. Rec. at 23055, 90th Cong. 1st Sess. (Rep. Mills).

[7] The regulation was promulgated with full appreciation of the tardiness of the state-administered "fair hearing."

hearing procedure before the local agency.[8] To diminish a part of the fiscal incentive for termination followed by a dilatory hearing process, H.E.W. departed from the general rule that aid may be afforded for current needs only, by requiring the states to make retroactive payments where termination is later reversed in the "fair hearing." H.E.W. Handbook, Pt. IV, §§6200(k), 6500(a).

Finally, on January 23, 1969, the Secretary promulgated the prior hearing regulation requiring continuation of aid in, it now appears, all termination cases except challenges to constitutional or statutory validity.[9] Although recently

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[8] Candor requires the observation that all of these time periods have been and remain largely theoretical, save perhaps for the required periodic reinvestigation every three or six months in AFDC, since that entails an entry at that time in the individual case record. The 30-day federal matching rule for acting upon information indicating possible ineligibility was and remains in the judgment of the case unit to decide when such information warrants investigation. That decision is in most cases made at the time of the follow-up and then reflected in the case record. There is no direct federal or state supervision of the line workers and state procedures are usually not designed to interfere with the flow of federal matching funds.

As we have seen, the federal 60-day period for "fair hearings" was and remains exhortatory; there is no federal action, short of defunding the state program, for dilatory "fair hearings." *Goldberg*, Br. of Appellees 59-61.

[9] The regulation appears at *Goldberg*, Br. of Appellees 62. While not an example of clarity to be easily applied by welfare officials, see *Goldberg*, Brief of National Institute for Education in Law and Poverty as *Amicus Curiae* 54 (hereinafter Br. of Institute), and *Goldberg*, Br. of Appellees 56, "issue of fact, or of judgment" has been interpreted by the Government to include all termination disputes except those involving questions of statutory or constitutional validity. The Government would seek to preclude hearings prior to termination "where the claimant challenges only the provisions of law or settled agency policy." Gov. Br. 33. The recipients terminated in these cases do not make such challenges and would be fully satisfied if prior hearings were afforded in all other cases of termination. We agree that questions of statutory

postponed to July 1970, and practically unmentioned in the Government's brief, the regulation was not repealed and *currently* represents a federal policy which the states must plan to implement. It was not an intent to observe the experiment said to be contained in the "substantial modifications" effective July 1968, and certainly not to allow the states time to digest these earlier "modifications," see, *infra*, pp. 10-13, that accounts for the postponement. The delay, as California candidly admits, *Wheeler*, Br. for Appellees 18-19, was a response to the vigorous political opposition of many states to this and other recently promulgated procedural regulations.[10] This political concession to the states cannot properly be considered a part of the administrative expertise of the Secretary; nor is it evidence of any cogent policy considerations considered by him and thus entitled to some deference by this Court. The federal regulatory structure simply does not lend credence to the speculative fears set forth in the Government's brief.

III.

We have dealt with the constitutional deficiencies of the new federal "advance notice" requirement, H.E.W. Handbook, Pt. IV, §2300(d)(5), in our discussions of the California and New York City pre-termination procedures.

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construction or constitutional validity are not appropriate for agency determination and are best settled by resort to the judicial process. Cf. *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, 239 (1968) (Harlan, J. concurring). The issue raised by Mrs. Guzman in *Goldberg* was to the *applicability* of agency policy in her case, *Goldberg*, Br. of Appellees 68, n. 81, and the "inadvertence" noted by the Government was its own, and not the district court's.

[10] See note 4 *supra*, p. 4.

Wheeler, Br. for Appellants 14-23; *Goldberg*, Br. for Appellees 48-50. Several points, however, require clarification. Since both the California and New York City procedures fully comply with this Handbook provision, it is clear that "advance notice of questions" is satisfied by California's and New York's written forms, and the recipient's "opportunity to discuss his situation" before termination is satisfied by New York City's letter of protest procedure. See Reply App. 7a.[11] "Advance notice *of questions*" and the required discussion, an addition to H.E.W.'s detailed preexisting code governing caseworker investigation of eligibility, H.E.W. Handbook, Pt. IV, §2000, *et seq.*, may occur at any point during the investigation process, not necessarily after investigation, and the procedure does not require a review by a relatively uninvolved official of the caseworker's reasons for termination. As the Government states,

> "It is merely a method of providing notice and screening out those cases which can be resolved by informal procedures." Gov. Br. 13.[12]

Nonetheless, the Government urges that this procedure is a "substantial modification" of prior practice since, the Government continues, formerly local agencies

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[11] Notice need be no more advance than California's three days, though one function of the federal requirement is said to be to eliminate the "element of surprise." Gov. Br. 12.

[12] The California procedure makes clear that it contemplates a discussion between line worker and recipient of eligibility questions and not a review of the reasons for termination. "The opportunity to meet" under the California procedure is "to discuss the entire matter informally for purposes of clarification and, *where possible, resolution.*" Calif. Social Services Manual, Section 44-325.43 [emphasis added]. The New York City procedure goes somewhat beyond this, but the review it offers is predicated on the case record and a possible letter of protest from the recipient.

"were not required to inform recipients that an investigation or evaluation was underway or to permit them to participate in the process leading to this initial decision." Gov. Br. 10.

This description of prior practice is irreconcilable with a plethora of H.E.W. regulations antedating Section 2300 (d)(5) which mandate in great detail the eligibility information to be provided recipients and their participation in all redeterminations of eligibility (including the special investigations upon report as well as the periodic recertifications).

"At least one" personal interview with the recipient has long been required for all such eligibility investigations and redeterminations. H.E.W. Handbook, Pt. IV, §§2220(5)(b), 2230(5)(c) (March 18, 1966) [now Sections 2200(e)(2), 2300(e)(3)].[13] The Handbook also required that:

"Applicants and recipients will be relied upon as the primary source of information about their eligibility." Section 2220(5)(a) (March 18, 1966) [now Section 2200(e)(1)].[14]

H.E.W. interpreted this to require the local agency to explain to the recipient what questions remained to be solved,

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[13] We are without access to the regulations of the Department of Health, Education and Welfare prior to March 1966. The substance of the regulations requiring recipient involvement in eligibility determinations certainly predates 1966, however.

[14] The Handbook explains that determinations of eligibility (including, of course, redeterminations) "are based on recognition of the rights and obligations of applicants and recipients to be responsible participants in the process." H.E.W. Handbook, Pt. IV, §2230(5) (March 18, 1966) [now Section 2300(e)(1)].

how *he* can resolve them, and the necessity for resolution.[15] H.E.W. Handbook, Pt. IV, §2230(5)(a) (March 18, 1966) [now Section 2300(e)(5)]. Obviously it has always been understood that client assistance will be sought to dissipate questions of possible ineligibility. Indeed, the agency was obligated "to help [recipients] provide needed information." H.E.W. Handbook, Pt. IV, §2220(5)(a) (March 18, 1966) [now Section 2200(e)(2)]. The role of the recipient was underlined by the requirement that he agree to *all* steps taken by the agency in its investigation of continued eligibility, including contact with third parties who might be in possession of relevant information. H.E.W. Handbook, Pt. IV, §2230(5)(e) (March 18, 1966) [now Section 2300(e)(2)].[16] Where, on the basis of all available information, the agency determined that the requirements for continued eligibility were not satisfied, it was under a duty to notify the recipient of such a determination in writing, and include therein "the reason why he has been determined to be ineligible"; the express purpose of notice was to enable the aggrieved recipient "to express dissatisfaction with the agency action." H.E.W. Handbook, Pt. IV, §2230(5)(d) (March 18, 1966) [now Section 2300(f)].

These requirements certainly are not evidence of the secret process without notice which the Government would have us believe Section 2300(d)(5) was intended to elimi-

[15] "If the individual is reluctant or unwilling to help resolve the question . . . the agency is responsible for considering carefully with him his reasons." H.E.W. Handbook, Pt. IV, §2230(5)(a) (March 18, 1966).

[16] Recipients were to be afforded a "clear interpretation of what information is desired, why it is needed, and how it will be used" before consent is sought to secure information from collateral sources. H.E.W. Handbook, Pt. IV, §2230(5)(c) (March 18, 1966) [now Section 2300(e)(2)].

nate. Except, therefore, as additional exhortation in this prolix code, it is difficult to discern what mandatory change is worked by Section 2300(d)(5). Whatever its purpose, the Section does not represent an experiment requiring substantial modification of prior state practice or necessitating time to adequately assess its effectiveness. See Gov. Br. 16. Pervasive personal contacts between caseworker and client in eligibility redetermination, and an opportunity to discuss eligibility questions with the caseworker have been the rule, not the exception, in welfare administration.[17]

IV.

The Government does not dispute that due process guarantees "against governmental capriciousness and arbitrariness" apply to the distribution of public assistance benefits. Gov. Br. 19-20. But it would justify summary procedure for revocation of such benefits on the legal principle that they are not "property (in the classic sense)," Gov. Br. 29, that they are less "tangible" than OASDI (Social Security) benefits, Gov. Br. 22, and that the interests of eligible recipients in retention of them is "more tentative" than one's interest in "property," Gov. Br. 27. These opaque legalisms will be recognized as variations on the

[17] At least since 1963 New York State has mandated that "in cases where there is indication of changes in need or resources" personal contacts with the recipient "as needed in excess of the minimum . . . shall be made." 18 N.Y.C.R.R. §351.22. The minimum referred to in the case of Home Relief and AFDC clients is once every three months. 18 N.Y.C.R.R. §82.1. The State regulations contemplate the possibility of additional personal contacts even in the case of *periodic* redeterminations (which in the case of Home Relief and AFDC recipients must be made every six months). 18 N.Y.C.R.R. §351.23(a), (b). Also, see, *Goldberg*, Br. for Appellees 33-37, 49-50.

theme of rights and privileges and invocation of the doctrine that the latter are not entitled to traditional constitutional safeguards against revocation. The inappropriateness of this dichotomy, particularly in a benefit program which sought "to introduce . . . a government of laws," Gov. Br. 21, is argued in the principal briefs. *Goldberg,* Br. of Appellees 12-13; *Goldberg,* Br. of Institute 10-17.

But the factors relied on by the Government to classify interests as worthy or unworthy of procedural protection under this dichotomy well reveal its irrelevancy in determining the procedural requirements of due process. The comparison with OASDI is illustrative. Under the right-privilege approach, the controlling difference is found in the financing of OASDI through a trust fund and public assistance through annual congressional appropriations. How the mechanics of financing bears upon the impact and character of the administrative decision, the nature of the individual and governmental interests, the decision-making process or "the type of proceeding involved," *Hannah* v. *Larche,* 363 U.S. 420, 440 (1960), is not explained. There are critical differences between OASDI and public assistance which bear directly upon the procedures that are due, as H.E.W. has itself recognized,[18] but the right-privilege dichotomy simply forecloses inquiry into them.[19]

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[18] The Government's assertion that it would be inconsistent to require prior hearings in the case of AFDC terminations when they are not available in the case of OASDI is curious in view of the contrary position taken by H.E.W., the agency charged with administering both programs. Federal financial participation is now available to those states which choose to provide hearings prior to termination of assistance, H.E.W. Handbook, Pt. IV, §6500(b), and, effective July 1, 1970, all states will be required to do so. 45 C.F.R. §205.10.

[19] As the Government said below, "[t]he OASDI program is not involved in this litigation." Reply App. 2a. Accordingly, the

We do not assert a due process right to a prior hearing in all circumstances of governmental action. Where the question is essentially who is to hold property or benefits pending adjudication, the requirements of due process may vary. But that is not the question we face in welfare programs, the last line of public defense against severe privation. Where welfare aid is erroneously and arbitrarily withdrawn before an opportunity to contest the decision, what is at stake is the brute fact of survival and indeed

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administration of that program, its actual procedures, and the impact of suspension or termination have not been explored in these cases. Some observations about the differences can be made, however.

Eligibility for OASDI is not based on need and beneficiaries can and usually do have resources and other sources of income. *Social Security Programs in the United States*, 20-21, U.S. Dept. of Health, Education and Welfare, Social Security Administration, March 1968. Eligibility is based on objectively verifiable criteria (age, death, family relationship and disability), 42 U.S.C. §§402, 432(c), and once established, is not subject to continuous redetermination. There are no caseworkers in OASDI. Far fewer events affect payment in OASDI than AFDC or OAA, and most all of them are objectively ascertainable and verifiable (*e.g.*, income subject to withholding, 42 U.S.C. §403(b)). The vast majority of terminations or suspensions are based on changes reported by the beneficiary himself. In some circumstances, payments may continue for a specified time beyond the date eligibility is found to cease. Public assistance under the federal programs is available to most OASDI beneficiaries.

Social Security benefits may in some circumstances be suspended upon an administrative finding that there is a danger of overpayment, after notice and a conference between an agency official and a beneficiary. Upon suspension, the beneficiary may request expedited payment or reinstatement upon alleging reasons why he is entitled to the payment. 42 U.S.C. §405(g) and 20 C.F.R. §404.968(a). He may also request reconsideration of the suspension, 20 C.F.R. §404.910. The beneficiary is also entitled to a prompt hearing before a Social Security hearing officer and an appeal to the Social Security administrative appeals counsel. He is then entitled to further review in the United States District Court. The hearing process in OASDI, with judicial review, is not unused. See generally Reply App. 11a-15a.

any effective opportunity to contest the determination. As we have seen in the instant cases, the interim hardships are incalculable and a subsequent hearing largely illusory. Indeed the Government observes that "[w]hile a substantial proportion of 'fair hearings' have in the past led to reversal or modification of adverse agency determinations, only a small proportion of terminations result in requests for hearings." Gov. Br. 30, n. 12. In light of the interim harms and the subsidized dilatoriness of the very subsequent "fair hearing," this is not a case of flexibility of timing. The issue really is the availability and effectiveness of any opportunity to be heard. See *Goldberg*, Br. of Appellees 58-61.

When the due process question is measured in these terms, the necessity of maintaining assistance until a hearing is apparent. We believe this Court recognized in *Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the relevancy of the significance of the "property" to the individual about to be deprived of its enjoyment. The invalidation of ancient garnishment procedures was based on the impact of summary process as applied to wages, "a specialized type of property presenting distinct problems." 395 U.S. at 430. The Court noted that summary process "might well drive a wage-earning family to the wall." 395 U.S. at 341-42. This decision, we believe, reflected a line of cases in this Court requiring a high degree of procedural fairness where an adjudicatory determination threatens a shattering impact on an individual.[20] *Garfield* v. *Goldsby*,

[20] The Government's distinction between benefits without cost to the Government, such as broadcasting licenses, and Government revenues is equally unhelpful in determining whether there is an "extraordinary situation" warranting summary process. The Government's interest in the proper use and allocation of such publicly

211 U.S. 249 (1908); *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922); *Willner* v. *Comm. on Character and Fitness*, 373 U.S. 96 (1963).

V.

There is also no merit in the argument that summary revocation can be justified as a means of accurately allocating and limiting discretionary expenditures in the interest of all welfare recipients. While no stranger to defenses of welfare practices, *King* v. *Smith, supra; Shapiro* v. *Thompson*, 394 U.S. 618 (1969), this justification is particularly indefensible here in light of the very allocating function of a fair hearing and the total lack of evidence or argument to support the spectre of abuse.

We first must observe that the existing welfare system cannot claim accuracy in allocating aid as one of its virtues; the inaccuracies weigh heavily on the side of underpayment and arbitrary revocation. *Goldberg*, Br. of Appellees 38-39, 57; Gov. Br. 30-31. The arbitrary, indeed cavalier, revocations of aid documented in the instant cases are

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owned resources as the limited number of broadcasting channels or air traffic routes is certainly no less than its interest in public revenues. And these resources are certainly not property in any classic sense. See, *Blumenthal* v. *F.C.C.*, 318 F. 2d 276 (D.C. Cir. 1963). But that hardly tells us when, if ever, the Government may summarily seize a broadcasting license or an air traffic route. The constitutional question would not be changed if the Government issued licenses to the highest bidder, thereby involving "public revenues" as well as public resources. Cf. *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964). The "extraordinary situation" represented by *Phillips* v. *Commissioner*, 283 U.S. 589, does not support summary process in any situation affecting "public revenues." Largely based on history, this extraordinary situation refers to the prompt collection of a tax, where payment is in jeopardy and not revocation of statutory benefits. See generally, Reich, The New Property, 73 Yale L. J. 733 (1964).

not speculative; the denial of an effective hearing is not calculated to diminish this pattern of administrative arbitrariness. Speculative focus on the so-called "ineligible individual" must not obscure the documented and deeply embedded characteristics of the present system. Nor should the welter of statistics obscure the individuals and families in the instant cases, and the many others similarly situated, victims of the welfare system's long emphasis on saving money. They do not see the relaxation of constitutional safeguards as somehow in the interests of all or any welfare recipients.

Against the reality of these "thousands of personal tragedies behind the statistics of public assistance," as the City of New York puts it, *Goldberg*, Br. of Appellants 11, we have a speculative cost argument that finds no support in the regulatory view of H.E.W. or the view of New York State, which does not join the City in this appeal.[21] Nor, upon examination, is the speculation well founded.

The additional expenditures of a prior hearing are not delineated by the number of persons receiving public assistance, though all have a stake in the outcome of this case. Nor is it relevant that some welfare recipients, about 2% in all, have joined together to deal with grievances

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[21] Other courts, familiar with the factors of local welfare administration, have reached a similar conclusion to that of the three-judge district court in *Goldberg* v. *Kelly*. *Machado* v. *Hackney*, 299 F. Supp. 644 (W.D. Texas 1969) (three-judge court); *Sims* v. *Juras*, Civ. No. 69-238 (D. Ore. August 21, 1969) (three-judge court); *Robertson* v. *Born*, Civ. No. 51364 (N.D. Calif. June 12, 1969); *Bailey* v. *Engleman*, Civ. No. 654-69 (D.N.J. Sept. 22, 1969); *Miller* v. *Zoeller*, Civ. No. 69-C-2 (W.D. Wisc. Jan. 20, 1969) (temporary restraining order); *Coleman* v. *Ott*, Civ. No. 68-1169-C (D. Mass. Jan. 1969) (stipulation of dismissal on condition that state adopt prior hearing procedure as outlined by the district court in *Goldberg* v. *Kelly*).

collectively. They do not petition for a joint or mass termination hearing, and denial of a specific grant or indeed adjustment of assistance is not comparable to withdrawal of a bi-weekly subsistence grant. It is also incorrect to infer the burdens from the gross number of cases terminated. By hypothesis, we deal here with *contested* initial decisions to withdraw aid, where the recipient, previously found eligible, sufficiently believes that circumstances have not changed to contest the caseworker's assessment in a hearing.

Experience in states affording a prior hearing before cutoff leaves no doubt that the number of persons who do pursue the hearing is limited, indeed disturbingly so in light of recognized rates of erroneous terminations. New York City is assuredly illustrative, with the largest number of AFDC recipients in the country, a recipient population relatively more aware of their legal rights, and with greater access to legal assistance, an excess of administrative problems and errors, and a high rate of terminations monthly. The overall figures indicate that from January 20, 1969 to May 30, 1969, 1014[22] persons out of over 60,000[23] terminations requested a prior hearing, and that approximately 51 percent of these persons prevailed in that hearing. Indeed this reversal rate would pass muster even under the Government's test of whether more "eligible" than "ineligible" persons request a hearing. The experience in California, Washington, D.C., and Massachusetts is not to the contrary.

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[22] New York City Department of Social Services, Review Section Reports for Quarter Ending March 31, 1969, and Months Ending April 30, 1969 and May 31, 1969.

[23] New York City Department of Social Services Monthly Statistical Report, May 1969, p. 10.

Nor is Mississippi, the Government's chosen state, an exception to this experience. The so-called "200 per cent" increase in requests for termination hearings in 1968-1969 arises against the virtual non-use of the delayed hearing after termination (97 out of 22,776 terminations in 1967-68).[24] And the reference to the "77 per cent" "ineligible" persons requesting pre-termination hearings in Mississippi ignores the 46 requests (out of the 288 prior hearings in one year) "withdrawn" prior to the hearing, which almost always occurs upon reinstatement by the local agency. It also ignores the recent findings of the United States Commission on Civil Rights on welfare administration in that state:

> "When a hearing is finally granted, there is no assurance it will be fair. . . . The local decision is often assumed correct."[25]

The report concludes that

> "Despite the Social Security Act principle that eligible persons have a 'right to aid' and to a 'rule of law,' the Mississippi welfare system ignores this in practice."[26]

The argument then comes down to assertion, and indeed an assertion that we are to accept for many years, until the refuting experience is certain. Gov. Br. 27. It will readily be appreciated that the assertion is ultimately founded on the premise of distrust too long characteristic

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[24] Mississippi Department of Welfare, Division of Statistics.

[25] Welfare in Mississippi, A Report of the Mississippi State Advisory Committee to the United States Commission on Civil Rights 66 (February 1969).

[26] *Id.* at 81-82.

of welfare administration. As the Government openly puts it, "if payments are continued pending 'fair hearing' there will be more requests for such hearings, and more payments will be made to ineligible individuals." Gov. Br. 26-27. We have already argued that this premise is both unfounded and impermissible where, as here, it results in the denial of any effective opportunity to be heard. *Goldberg*, Br. of Appellees 56-61.

We stress here only that welfare agencies, rather more than most, possess ample authority and flexibility both to deal with abuses and to minimize the costs and inconveniences of fair process. Civil remedies in the form of recovery provisions for overpayments frequently are invoked[27] (and valid terminations are usually based on resources or income). Criminal sanctions exist and are used for misrepresentation of eligibility and knowing improper retention of benefits. The nature of eligibility disputes, being limited to a single issue or two, and a highly localized system of administration allows unusual expedition in the scheduling and holding of a welfare hearing. The pattern of 3-6 month delays, sometimes longer, in the post-termination "fair hearing" process cannot be explained by the practicalities of administration, as can be seen in the revised two week pattern in those states now continuing aid pending a hearing.[28] Although the welfare system is not

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[27] See Graham, Public Assistance: The Right to Receive; The Obligation to Repay, 43 N.Y.U.L. Rev. 451 (1968).

[28] Mississippi, Manual Sec. F., pp. 6101-6103 (fair hearing, 20 days); Washington, D.C., Handbook of Public Assistance Policies and Procedures (HPA-II) BR 1.1, III, Sec. 17 (fair hearing, 15 days); New York State, Letter of Commissioner, Department of Social Services, to Local Commissioners, *Goldberg*, Br. of Appellees 92 at 95 (local agency hearing, two weeks); New York City Department of Social Services, Procedure No. 69-7 (January 15, 1969) I(4)(a) (14 days).

known for the exercise of flexibility, the flexibility assuredly is there, and the minimal guarantees of due process do not impose "fixed molds" precluding its exercise. The application of accepted norms of due process to welfare terminations does not impose costs or burdens in excess of those inherent in any system of Government that has sufficient regard for the rights of individuals to provide an opportunity to be heard in making adjudicatory decisions affecting their vital interests.

In the final analysis, the Government's brief puts before this Court the questions posed by Professor Harry Jones over a decade ago in "The Rule of Law in the Welfare State," 58 Colum. L. Rev. 143, 156 (1958):

> "In an era when rights are mass produced, can the quality of their protection against arbitrary official action be as high as the quality of the protection afforded in the past to traditional legal rights less numerous and less widely dispersed among the members of society? . . . Is it beyond hope that this vast new company of officials can, in time, develop a tradition of decision worthy of being called, in Pound's fine phrase, an 'ethos of adjudication?' "

We submit the Government's answer to these questions is both untimely and incorrect.

CONCLUSION

The judgment of the District Court in No. 62, *Goldberg* v. *Kelly*, should be affirmed.[29] The judgment of the District Court in No. 14, *Wheeler* v. *Montgomery*, should be reversed.

Respectfully submitted,

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[29] The Government's request that the judgment in No. 62 be affirmed with modification of the conditions appears to be inadvertent error. The Government provides no legal grounds in its brief to continue the preliminary injunction against the use of option (b), the New York City procedure, in either the AFDC or Home Relief Programs.

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APPENDIX

REPLY APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 394

68 Civ. 864

JOHN KELLY, *et al.*,

Plaintiffs,

—v.—

GEORGE K. WYMAN, *et al.*,

Defendants.

BRIEF OF THE UNITED STATES AMICUS CURIAE

Introduction

This brief is filed by the United States in response to the court's request. It describes certain Federal policies and procedures applicable to the Federal-State program of Aid to Families with Dependent Children (AFDC), Title IV, part A of the Social Security Act, 42 USC 601-609, and those followed in the Federally-administered program of Old-Age, Survivors, and Disability Insurance (OASDI), Title II of the Social Security Act, 42 USC 401 et seq.

No attempt is made to argue or discuss on the merits the constitutional or other issues which are raised by this case. Rather, this brief sets forth certain relevant Federal policies and how they operate, together with an explanation of some of the factors which the Federal agency must take

into account in the development and application of these policies.

In responding to the court's request, we have placed emphasis on furnishing information and clarification. We have not undertaken to discuss in any detail the authority or legal rationale for the various Federal policies. The OASDI program is not involved in this litigation. As for the AFDC program, whether the plaintiff-clients or the defendant-State and local agencies should prevail in this case, it appears, as will be discussed below, that there will be no violation of Federal requirements.

I. *Title IV, part A, of the Social Security Act (AFDC)*

Title IV, part A, of the Social Security Act contains the statutory authorization for the Federally-assisted AFDC program, which is administered by the States and localities. Under this title, as is the case in the other public assistance programs, the Secretary is responsible for determining whether State plans submitted conform to the requirements of the Social Security Act and the Federal policies adopted pursuant to the statute to carry out those requirements.

These implementing policies, which are presently found in the Federally-issued Handbook of Public Assistance Administration (hereinafter cited as HB), reflect the Federal agency's interpretation of the specific provisions, construed in light of the broad purposes, of Title IV, part A, of the Social Security Act. The Federal policies pertaining to State agency procedures such as the prior notice and fair hearing requirements involved in the present litigation, set forth the minimum standards necessary for an approvable State plan. States are free, insofar as their relationship with the Department of Health, Education, and Welfare is concerned, to adopt additional or more elaborate procedures than the Federal basic requirements.

In addition, Federal matching policies are often broader than Federal requirements. Thus, under Handbook Transmittal No. 140, States are not required to continue assistance pending a fair hearing decision, but if a State does continue assistance, Federal matching would be available for all the attendant expenditures by the State agency in accordance with the usual rates described below.

In general, no question would be raised by the Federal administrative agency should a State do more than the minimum Federal requirements, and Federal matching could be claimed for the additional related expenditures. Therefore, because there would likely be no conflict with Federal plan requirements and no loss of Federal funds regardless of what decision this court might reach on the merits of the litigation, we have not deemed it either appropriate or necessary to include legal argument on those issues. For the reasons stated above, it does not appear that the validity of the Federal policies under either the Federal statute or the constitution is in issue here.

The Statute

Section 602 of 42 USC contains three provisions in particular which are relevant to the claims of those plaintiffs in the above-captioned litigation who have been receiving AFDC. In order to be approved by the Secretary, and hence be eligible for Federal matching, the State plan must

> "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;" § 602(a)(10),

"provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness;" § 602(a)(4), and

"provide . . . such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan . . . " 42 USC § 602(a)(5)(A).

The Federal Policy

(a) *Application, Determination of Eligibility and Furnishing Assistance*

Under the policies applicable to a Federally-assisted AFDC program, once the State welfare agency has found an individual (or, as is more common in AFDC, the family unit) eligible for a cash assistance payment, these payments must continue until there has been an agency determination that the individual is no longer eligible for assistance or, although not totally ineligible, should receive a lesser amount of assistance. The agency may not cease or reduce payment while investigating a family's current situation or evaluating information it may have received which appears to raise a question about continuing eligibility. HB, Part IV, § 2200(b)(4). Thus, until the agency has completed any redetermination it may make, has considered all the relevant available information, and has made a definite determination of ineligibility, or change in amount of assistance needed, payments must continue as before.

Effective July 1, 1968, as part of the required procedure, should any question arise concerning change in the family's circumstances, the State agency

"gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." HB, Part IV, § 2300(d)(5).

This procedure is designed to serve several purposes. First, it is intended to give the individual a chance to bring new or additional facts to the agency's attention; thus, he may be able to show, prior to any more formal action, that his situation has not actually changed as believed by the agency. Where this can be accomplished, termination (or reduction) of assistance is avoided, with benefit to both the individual who does not have his usual payments interrupted, and to the agency which will be spared the expense and staff time involved in an unnecessary hearing.

Even in cases which would not be contested by the individual, the advance notice provides him with time to prepare for the change which the reduction or termination of assistance will have on his financial situation. This policy seeks to avoid a situation in which a person is caught completely by surprise with a notice that he will no longer receive any assistance or will receive a lesser amount than formerly.

It should be made clear at this point that the prior notice procedure described above, as required by the Federal policies, is not intended to constitute the "fair hearing" required by the Federal statute, and which will be discussed separately below. The formalities of the fair hearing process are not required at this stage, although a State would certainly be free to add safeguards to this adjustment procedure which go beyond the minimum Federal requirement. This informal process gives notice, and per-

mits an exchange of information before the actual determination is made by the State agency, and as stated above, since this takes place before the agency has made the determination to reduce or terminate assistance, payments must continue without interruption or reduction throughout this time period.

This procedure also operates to "sort out" those cases which will proceed to the fair hearing. Clearly, every recipient has a right to a fair hearing if he is not satisfied with the determination made by the agency in his case; however, it is hoped that this preliminary process will resolve many of the disputes and thus satisfy the recipient. This procedure is also intended to be expeditious. Therefore, the Federal agency expects that the time from which notice is given to the recipient of questions about his eligibility, through agency consideration of any information which is brought to its attention, until the time the agency notifies the individual of its final decision, will not exceed 30 days. The policies on Federal financial participation set an outer limit of 30 days on the time period for which Federal matching may be claimed in assistance payments continued during the notice and adjustment process.

Federal financial participation may be claimed for all the expenditures which the State agency incurs in connection with the prior notice and adjustment procedure described above. The Federal agency will pay 50% of the administrative costs and also participate in the assistance payments made to the individual throughout this 30-day period in accordance with the usual formula (which, for assistance payments under the New York program, is also 50%). (HB, Part IV, § 5514(2)(c) (as revised)).

The procedure which New York has adopted in response to the Handbook policy on prior notice and which is in issue

in the present litigation satisfies the basic objectives of that Federal requirement. While New York has allowed for variations in procedures under its two options, they both meet the purposes for which this requirement was designed, namely the giving of advance notice to the recipient before action is taken by the agency, and the availability of a mechanism whereby information may be presented, and adjustment is possible.

Plaintiffs, in their Brief in Opposition to Defendants' Motion for Summary Judgment, question whether the New York procedure meets the Federal requirement that the State plan "be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 USC 602(a)(1). While it is certainly true that this provision means that there must be a uniform program in effect throughout the State, the Department of Health, Education, and Welfare does not interpret this section of the statute to require absolutely identical procedures in every political subdivision. Rather, this subsection is satisfied if the procedures everywhere in the State meet the fundamental purposes to which the Federal policy is directed. In some instances, the Department of Health, Education, and Welfare may determine that there is only one possible procedure, or that certain components are essential (or, even, unacceptable), in order to carry out its purposes. However, in the present case, both options which the New York State agency allows provide prior notice and an adjustment procedure, and thus, the possible differences in other details do not raise a question of the uniformity of the program.

The Department of Health, Education, and Welfare has approved the New York regulation, but is nevertheless seeking clarification on one point. The Federal policy on prior notice and adjustment is mandatory with respect to both

contemplated terminations and reductions of assistance. The New York regulation only expressly refers to the former situation. Therefore, it is necessary to seek confirmation from the New York agency to assure that its procedures on prior notice and adjustment are equally applicable to proposed reductions in the assistance payment.

(b) *The Fair Hearing*

As stated above, the Federal statute requires the State agency to provide an opportunity for a fair hearing to anyone whose claim for assistance is denied, or is not acted upon with reasonable promptness. This has been interpreted by the Department of Health, Education, and Welfare to require the same fair hearing in connection with termination of assistance or reduction in the amount of assistance and, indeed, such a hearing may also be required in connection with various other decisions which the agency makes affecting the AFDC family. See, generally, HB, Part IV, § 6200 et seq.

The Federal policies contemplate, in any termination or reduction of assistance, that the welfare agency will give formal written notification of the action to the client (after use of the prior notice and adjustment procedure discussed above). At this point, the client has a right to a fair hearing. In New York, as in other jurisdictions where there is local administration, the distinction between these two procedures is clearcut. The locality (New York City) gives the recipient advance notice and an opportunity to provide additional information. After considering the information, if any, that may be presented, the locality makes its formal determination and informs the recipient in writing. The recipient may then request a fair hearing before the State agency.

Under the current policies in the Handbook, continuation of assistance pending the fair hearing decision is not required.[1] However, should the State welfare agency choose to continue such payments, with no recovery or adjustment should the hearing decision be in favor of the agency, or should this court rule that continuation is required, such a practice would be completely consistent with Federal rules, and Federal financial participation may be claimed for the assistance payments made during this period. HB, Part IV, § 6500(b). Matching will be available in accordance with the usual 50% rate (for New York) for assistance payments.

In February, 1968, the Department of Health, Education, and Welfare notified all States that, effective July 1, 1968, payments of assistance retroactive to the date of the incorrect agency action must be made in those cases where the decision of the State agency following the fair hearing is favorable to the claimant (HB, Part IV, § 6200 (k)), and Federal financial participation may be claimed for such retroactive assistance payments. HB, Part IV, § 6500 (a). This requirement applies to hearing decisions after June 30, 1968 and means that retroactive payments must be made back to the date of the incorrect agency action or July 1, 1968, whichever is later. If the incorrect action was earlier than July 1, 1968 and the State chooses to make retroactive payments for the full period, Federal financial participation is available for the payments back to the date of the incorrect action.

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[1] The Department of Health, Education and Welfare has decided to adopt a policy requiring states to continue assistance in certain classes of cases until a decision is rendered in the fair hearing proceeding. Although no formal statement of this contemplated policy has been issued, distinction between classes of cases along the lines suggested at pages 8-10 of Judge Bryan's Memorandum convening a three-judge court in this matter is being considered.

In addition, the States were notified at the same time of several other new policies, some pertaining to the increased availability of Federal matching and others setting forth new plan requirements in the area of fair hearings. The new Federal requirements became effective July 1, 1968 and New York submitted implementing plan material. However, the State was notified that its plan amendment was not acceptable in several areas. In particular, the plan amendment was deficient with respect to its provision for (1) detailing of the circumstances under which an individual could obtain a fair hearing, (2) informing the local agencies of fair hearing decisions and assuring that such decisions will be treated as precedents by the State and local agencies and will be made available to claimants and their representatives and the general public for their precedential value, (3) providing an impartial medical assissment at agency expense when medical issues are involved in the hearing, (4) making retroactive payments where the fair hearing decision of the State agency is favorable to the claimant, and (5) specifically providing that the hearing officer's decision must be based only upon evidence which is a part of the record.

Because of the pendency of these questions, no action on the plan amendment has been taken by the Federal administrative agency. It is their understanding that New York is in the process of preparing revised material to fully comply with the Federal requirements and will then submit the revision for formal Federal approval. While the New York plan, as currently approved, does not at this moment fully meet the Federal requirements regarding fair hearings, no question of continuation of Federal funds has been raised, in view of the continuing negotiations between the Federal and State agencies. Federal funds of course, are

not withdrawn unless there has been formal disapproval of a State plan and the State has been given notice and opportunity for hearing.

As this court is aware, the question of whether a State welfare agency is required under the due process clause of the Fourteenth Amendment or any other generally applicable principle of law, to continue assistance pending the fair hearing decision, is one which is currently the subject of litigation in various other jurisdictions.[2]

II. *Title II of the Social Security Act (OASDI)*

Termination and Suspension of OASDI Benefits

1. The entitlement of an individual to an OASDI benefit depends on meeting stated statutory conditions. Once established, the individual's entitlement to the benefit continues until the occurrence of specified termination events. Upon the occurrence of such an event, the benefits are terminated as of the close of the month preceding the month in which the event occurred. In disability benefit cases, however, the benefits are terminated as of the close of the second month following the month in which the disability ceased; or, in cases in which benefits are terminated because the individual returned to work, the termination is effective as of the close of his "trial work period" which can be as late as the eleventh month following the month he returns to work.

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[2] In addition to the cases cited on page 10 of Judge Bryan's memorandum opinion in this matter, we understand that these suits have been filed in Federal district courts: *Machado* v. *Hackney*, C.A. No. 68-108-SA (W.D. Tex.); *Sprayberry* v. *Dulaney*, C.A. No. (M.D. Ga.); *Van Blaricum* v. *Department of Public Welfare*, C.A. No. 68-78 (S.D. Ohio).

2. Between the date as of which entitlement to the benefits is established and the occurrence of an event calling for the termination of the benefit, other statutorily prescribed events may occur that require the suspension or nonpayment of the benefit (as distinguished from terminating entitlement to the benefit) for one or more months. These events are principally:

a. Earnings by a beneficiary over and above an amount prescribed by the statute;

b. Work outside the United States by a beneficiary for a period of time specified by the law;

c. Residence by an alien beneficiary outside the United States;

d. Court-ordered suspension upon conviction for subversive activities;

e. Refusal of vocational rehabilitation services by a disability insurance beneficiary;

f. No entitled child in a mother's care;

g. Deportation of the beneficiary;

h. Receipt by a disability insurance beneficiary of periodic workmen's compensation payments; and

i. The performance of substantial gainful activity by an occupationally blind disability insurance beneficiary.

3. The determination of the Social Security Administration to terminate a benefit because of the occurrence of a specified terminating event or to suspend the payment of a benefit for one or more months because of the occurrence of a suspension event, is based in the vast majority of cases on a report of the occurrence of the event by the bene-

ficiary. The determination to terminate a benefit or to suspend its payment for one or more months may be made also on information obtained by the Administration from other sources. Before this is done, however, the beneficiary is usually contacted by the Social Security Administration and asked to submit a report relative thereto which often furnishes also necessary data on which to base a termination or suspension and on which the termination or suspension determination is then made. The greatest number of these suspensions by far are based on reports of current wages from employment or of self-employment income derived by beneficiaries in amounts in excess of those they may earn or derive under the statute and still receive their benefits.

In every case in which a benefit is terminated or suspended, whether the action is taken pursuant to the report from the beneficiary or on information obtained from other sources, the individual affected is notified in writing of the determination and is advised of his rights to further administrative and court review of the determination.

Under the regulations of the Social Security Administration adopted pursuant to section 205(b) of the Social Security Act, the determination of the Administration to terminate or suspend a benefit is a "final decision" if the beneficiary fails to seek its reconsideration by the Administration, 20 CFR 404.908, and each successive administrative decision likewise is, in turn, a "final decision" unless further administrative review is sought, as provided by the regulations, 20 CFR 404.916, 404.940, 404.951, or if after all such administrative review has been had, the beneficiary does not seek court review as provided by section 205(g) of the Act.

Benefits are not certified by the Administration for payment to a beneficiary from and after the effective date of

the initial determination terminating or suspending payment of a benefit unless it is reversed on further administrative review or by a court on court review. Upon reversal, the benefit is certified for payment retroactively to the date as of which it was terminated or suspended.

4. The certification of benefits for payment may be withheld also while the Administration, on the basis of information it has received, is conducting an investigation to determine whether or not it should terminate the benefit or suspend its payment for one or more months. This, as the Social Security Administration Claims Manual states, may be done, however, "only where it appears probable that payments will eventually have to be suspended or terminated," and may continue, it is further stated in the Manual, merely "as long as necessary to offset the probable overpayment." Claims Manual section 5036, paragraph 1. Social Security district offices and reviewing offices are enjoined, too, to give high priority to such investigations, to complete them promptly and to determine as quickly as possible whether or not benefits should be terminated or suspended. Claims Manual section 5036, paragraph 2.

There are some instances also in which payment may be withheld for administrative reasons not related to the right to payment but to what might be termed the "technique of payment." This occurs where the Administration is notified by the Post Office Department or by others that the beneficiary has moved and left no forwarding address or where the appointment of a representative payee may be required. In these instances all past due benefits are, of course, certified for payments as soon as new proper address is obtained or a payee is appointed.

5. Section 203(h) of the Social Security Act expressly authorizes the Administration to withhold certifications of

payment pending investigation as to whether work deductions should be imposed. Sections 205(b) and (i) of the Act appear to authorize the Administration to withhold certifications of payment pending determination of whether or not to terminate or suspend certification for payment in other than work deduction instances.

Payments may be withheld pending development of the facts essential to a determination as is recognized by section 205(g) of the Act, authorizing the Administration, under stated conditions, to adopt "expedited benefit payment" procedures; by section 204 of the Act, specifying to whom unpaid benefits due a deceased beneficiary shall be paid; and by section 206 of the Act which provides for setting of attorneys' fees in Title II cases.[3]

III. *AFDC and OASDI Compared*

For purposes of drawing an analogy between the procedures followed by the Social Security Administration in operating its program of OASDI, and the Federal requirements pertaining to AFDC programs, it may be helpful to note some differences in the overall situations:

1. The kinds of situations or events which might give rise to termination or reduction of benefits are far fewer in OASDI than in public assistance, particularly AFDC. Also, most of the events affecting payment of OASDI tend to be more readily susceptible to objective ascertainment and hence less open to dispute than is often the case in the public assistance programs.

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[3] *Hopkins* v. *Cohen*, 390 U.S. 530 (1968) held that accrued benefits due a beneficiary and his family, to which they became entitled as the result of judicial review, provide the base for determining the attorney's fee.

2. In OASDI, the events which result in suspension or termination are often changes in circumstances which the beneficiary himself reports to the Social Security Administration; thus, the resultant action is generally expected and understood by the individual.

3. There is a much greater likelihood of change in the amount of a recipient's payment under AFDC, than there is in OASDI, or even in the other public assistance categories of the Social Security Act (Titles I, X, XIV, and XVI). If the recipient obtains temporary employment for a month, he will be eligible only for a reduced payment, or perhaps no payment at all; when the income ceases, the family will probably be eligible for the full amount previously paid. Support payments may be made by an absent father for a few months and then cease. The problem, therefore, of the proper procedures to be followed in AFDC is more difficult for both the recipient and for the State agency, than is the comparable situation in OASDI.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 62.—October Term, 1969

Jack R. Goldberg, Commissioner of Social Services of the City of New York, Appellant,
v.
John Kelly et al.

On Appeal From the United States District Court for the Southern District of New York.

[March 23, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

The question for decision is whether a State which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program.[1] Their complaint alleged that the

[1] AFDC was established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601–610. It is a categorical assistance program supported by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education and Welfare. See N. Y. Social Welfare Law §§ 343–362 (McKinney 1966). We considered other aspects of AFDC in *King* v. *Smith*, 392 U. S. 309 (1968), and in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

Home Relief is a general assistance program financed and administered solely by New York state and local governments. N. Y.

New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law.[2] At the time the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial

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Social Welfare Law §§ 157–166 (McKinney 1966). It assists any person unable to support himself or to secure support from other sources. *Id.*, § 158.

[2] Two suits were brought and consolidated in the District Court. The named plaintiffs were 20 in number, including intervenors. Fourteen had been or were about to be cut off from AFDC, and six from Home Relief. During the course of this litigation most, though not all, of the plaintiffs either received a "fair hearing" (see pp. 5–6, *infra*) or were restored to the rolls without a hearing. However, even in many of the cases where payments have been resumed, the underlying questions of eligibility which resulted in the bringing of this suit have not been resolved. For example, Mrs. Altagracia Guzman alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. The record shows that payments to Mrs. Guzman have not been terminated, but there is no indication that the basic dispute over her duty to cooperate has been resolved, or that the alleged danger of termination has been removed. Home Relief payments to Juan DeJesus were terminated because he refused to accept counseling and rehabilitation for drug addiction. Mr. DeJesus maintains that he does not use drugs. His payments were restored the day after his complaint was filed. But there is nothing in the record to indicate that the underlying factual dispute in his case has been settled.

aid do so according to a procedure which conforms to either subdivision (a) or subdivision (b) of § 351.26 of the Regulations as amended.[2] The City of New York elected to promulgate a local procedure according to subdivision (b). That subdivision, so far as here pertinent, provides that the local procedure must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to

[2] The adoption in February 1968 and the amendment in April of Regulation § 351.26 coincided with or followed several revisions by the Department of Health, Education, and Welfare of its regulations implementing 42 U. S. C. § 602 (a)(4), which is the provision of the Social Security Act that requires a State to afford a "fair hearing" to any recipient of aid under a federally assisted program before termination of his aid becomes final. This requirement is satisfied by a post-termination "fair hearing" under regulations presently in effect. See HEW Handbook of Public Assistance Administration, Pt. IV, §§ 6200–6400. A new HEW regulation, 34 Fed. Reg. 1144 (1969), now scheduled to take effect in July 1970, 34 Fed. Reg. 13595 (1969), would require continuation of AFDC payments until the final decision after a "fair hearing" and would give recipients a right to appointed counsel at "fair hearings." 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 1356 (1969). For the safeguards specified at such "fair hearings" see HEW Handbook, Pt. IV, §§ 6200–6400. Another recent regulation now in effect requires a local agency administering AFDC to give "advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." HEW Handbook, Pt. IV, § 2300 (d)(5). This case presents no issue of the validity or construction of the federal regulations. It is only subdivision (b) of § 351.26 of the New York State regulations and implementing procedure 68–18 of New York City which pose the constitutional question before us. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 641 (1969). Even assuming that the constitutional question might be avoided in the context of AFDC by construction of the Social Security Act or of the present federal regulations thereunder, or by waiting for the new regulations to become effective, the question must be faced and decided in the context of New York's Home Relief program, to which the procedures also apply.

its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that "[a]ssistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later."

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68–18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of

evidence, and for confrontation and cross-examination of adverse witnesses.[4] However, the letter does inform the recipient that he may request a post-termination "fair hearing."[5] This is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld.[6]

[4] These omissions contrast with the provisions of subdivision (a) of § 351.26, the validity of which is not at issue in this Court. That subdivision also requires written notification to the recipient at least seven days prior to the proposed effective date of the reasons for the proposed discontinuance or suspension. However, the notification must further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at a time and place indicated before the official identified in the notice, who will review his case with him and allow him to present such written and oral evidence as the recipient may have to demonstrate why aid should not be discontinued or suspended. The District Court assumed that subdivision (a) would be construed to afford rights of confrontation and cross-examination and a decision based solely on the record. 294 F. Supp., at 906–907.

[5] N. Y. Social Welfare Law § 353 (2) (McKinney 1966) provides for a post-termination "fair hearing" pursuant to 42 U. S. C. § 602 (a) (4). See n. 3, *supra*. Although the District Court noted that HEW had raised some objections to the New York "fair hearing" procedures, 294 F. Supp., at 898, n. 9, these objections are not at issue in this Court. Shortly before this suit was filed, New York State adopted a similar provision for a "fair hearing" in terminations of Home Relief. 18 NYCRR §§ 84.2–84.23. In both AFDC and Home Relief the "fair hearing" must be held within 10 working days of the request, § 84.6, with decision within 12 working days thereafter, § 84.15. It was conceded in oral argument that these time limits are not in fact observed.

[6] Current HEW regulations require the States to make full retroactive payments (with federal matching funds) whenever a "fair hearing" results in a reversal of a termination of assistance. HEW Handbook, Pt. IV, §§ 6200 (k), 6300 (g), 6500 (a); see 18 NYCRR § 358.8. Under New York State regulations retroactive payments

HEW Handbook, Pt. IV, §§ 6200–6500; 18 NYCRR §§ 84.2–84.23. A recipient whose aid is not restored by a "fair hearing" decision may have judicial review. N. Y. Civil Practice Law and Rules, Art. 78 (McKinney 1963). The recipient is so notified, 18 NYCRR § 84.16.

I

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits.[7] The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims. The Court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." *Kelly* v. *Wyman*, 294 F. Supp. 893, 899, 900 (1968). The Court

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can also be made, with certain limitations, to correct an erroneous termination discovered before a "fair hearing" has been held. 18 NYCRR § 351.27. HEW regulations also authorize, but do not require, the States to continue AFDC payments without loss of federal matching funds pending completion of a "fair hearing." HEW Handbook, Pt. IV, § 6500 (b). The new HEW regulations presently scheduled to become effective July 1, 1970, will supersede all of these provisions. See n. 3, *supra*.

[7] Appellant does not question the recipient's due process right to evidentiary review *after* termination. For a general discussion of the provision of an evidentiary hearing prior to termination, see Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich. L. Rev. 112 (1969).

rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance . . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Id.*, at 901. Although state officials were party defendants in the action, only the City of New York appealed. We noted probable jurisdiction, 394 U. S. 971 (1969), to decide important issues which have been the subject of disagreement in principle between the three-judge court in the present case and that convened in *Wheeler* v. *Montgomery*, No. 14, also decided today. We affirm.

Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.[8] Their termination

[8] It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property. It has been aptly noted that

"[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether

involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro* v. *Thompson*, 394 U. S. 618, 627, n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398 (1963); or to denial of a tax exemption, *Speiser* v. *Randall*, 357 U. S. 513 (1958); or to discharge from public employment, *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956).[9] The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refuge Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature

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private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L. J. 733 (1964).

[9] See also *Goldsmith* v. *United States Board of Tax Appeals*, 270 U. S. 117 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); *Hornsby* v. *Allen*, 326 F. 2d 605 (C. A. 5th Cir. 1964) (right to obtain a retail liquor store license); *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (C. A. 5th Cir.), cert. denied, 368 U. S. 930 (1961) (right to attend a public college).

of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah* v. *Larche*, 363 U. S. 420, 440, 442 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.[10] But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach* v. *Family Finance Corporation*, 395 U. S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.[11] Cf. *Nash* v. *Florida Industrial Commis-*

[10] One Court of Appeals has stated: "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *R. A. Holman & Co.* v. *SEC*, 299 F. 2d 127, 131 (C. A. D. C. Cir.), cert. denied, 370 U. S. 911 (1962) (suspension of exemption from stock registration requirement). See also, for example, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908) (seizure of food not fit for human use); *Yakus* v. *United States*, 321 U. S. 414 (1944) (adoption of wartime price regulations); *Gonzales* v. *Freeman*, 334 F. 2d 570 (C. A. D. C. Cir 1964) (disqualification of a contractor to do business with the Government). In *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, at 896, summary dismissal of a public employee was upheld because "[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control," and because the case involved the Government's "dispatch of its own internal affairs." Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

[11] Administrative determination that a person is ineligible for welfare may also render him ineligible for participation in state-financed medical programs. See N. Y. Social Welfare Law § 366 (McKinney 1966).

sion, 389 U. S. 235, 239 (1967). Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental largesse is ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[12]

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.[13] This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings

[12] His impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility. See Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Ford. L. Rev. 604, 610–611 (1969).

[13] See, *e. g.*, Reich, *supra*, n. 8, 74 Yale L. J., at 1255.

of Liberty to ourselves and our Posterity." The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of

public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 294 F. Supp., at 904–905.

II

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient with a full administrative review.[14] Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. *Sniadach* v. *Family Finance Corporation*, 395 U. S. 337, 343 (1969) (HARLAN, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare

[14] Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a "fair" hearing there will be no need for a preliminary hearing.

departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.[18]

We are not prepared to say that the seven-days notice currently provided by New York City is constitutionally insufficient *per se*, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the con-

[18] This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. See *FCC* v. *WJR*, 337 U. S. 265, 275–277 (1949).

tent or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.[16] It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of in-

[16] "[T]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have." Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 342 (1966).

eligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, Pt. IV, § 6400 (a).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g., ICC* v. *Louisville & N. R. R. Co.*, 227 U. S. 88, 93–94 (1913); *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 103–104 (1963). What we said in *Greene* v. *McElroy*, 360 U. S. 474, 496–497 (1959), is particularly pertinent here:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 13595 (1969).

Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co.* v. *PUC*, 301 U. S. 292 (1937); *United States & ICC* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 288–289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. R. & Light Co.* v. *PUC*, 260 U. S. 48, 57–59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. *In re Murchison*, 349 U. S. 133 (1955); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 45–46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 62.—October Term, 1969

Jack R. Goldberg, Commissioner of Social Services of the City of New York, Appellant, *v.* John Kelly et al.	On Appeal From the United States District Court for the Southern District of New York.

[March 23, 1970]

Mr. Justice Black, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far towards becoming a welfare state, that is, a nation that for one reason or another taxes its most affluent people to help support, feed, clothe and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter.[1] Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on the Government and it cer-

[1] This figure includes all recipients of Old-age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, and general assistance. In this case appellants are AFDC and general assistance recipients. In New York State alone there are 951,000 AFDC recipients and 108,000 on general assistance. In the Nation as a whole the comparable figures are 6,080,000 and 391,000. U. S. Bureau of the Census, Statistical Abstract of the United States: 1969 (90th ed.), Table 435, at 297.

tainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

The dilemma of the ever-increasing poor in the midst of constantly growing affluence presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such. It was largely to escape just such pressing economic problems and attendant government repression that people from Europe, Asia, and other areas settled this country and formed our Nation. Many of those settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers within written boundaries, which eventually became written constitutions.[2] They wrote their basic charters as nearly as men's collective wisdom can do so as to proclaim to their people and their officials an emphatic command that "Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free."[3]

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[2] The goal of a written constitution with fixed limits on governmental power had long been desired. Prior to our colonial constitutions, the closest man had come to realizing this goal was the political movement of the Levellers in England in the 1640's. J. Frank, The Levellers (1955). In 1647 the Levellers proposed the adoption of An Agreement of the People which set forth written limitations on the English Government. This proposal contained many of the ideas which later were incorporated in the constitutions of this Nation. *Id.*, at 135–147.

[3] This command is expressed in the Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Representatives of the people of the original Thirteen Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments—Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention.[4] In my judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. True, *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137 (1803), held, and properly, I think, that courts must be the final interpreters of the Constitution, and I recognize that the holding can provide an opportunity to slide imperceptibly into constitutional amendment and law making. But when federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.

The more than a million names on the relief rolls in New York,[5] and the more than nine million names on

[4] It was proposed that members of the judicial branch would sit on a Council of Revision which would consider legislation and have the power to veto it. This proposal was rejected. J. Elliot, Elliot's Debates, vol. I, pp. 160, 164, 214 (Journal of the Federal Convention); 395, 398 (Yates' Minutes); vol. V, 151, 164–166, 344–349 (Madison's Notes) (2d ed. 1836). It was also suggested that The Chief Justice would serve as a member of the President's executive council, but this proposal was similarly rejected. *Id.*, Vol. V, 442, 445, 446, 462.

[5] See n. 1, *supra*.

the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedy some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the Government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the Government first affords them a full "evidentiary hearing" even though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their parts, the Court holds that the Government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the Government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. Cf. *Adamson* v. *California*, 332 U. S. 46, 71–

72, n. 5 (dissenting opinion) (1947). The Court, however, relies upon the Fourteenth Amendment and in effect says that failure of the Government to pay a promised charitable instalment to an individual deprives that individual of *his own property*, in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that a government's promise of charity to an individual is property belonging to that individual when the Government denies that the individual is honestly entitled to receive such a payment.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing "the recipient's interest in avoiding" the termination of welfare benefits against "the government's interest in summary adjudication." *Ante*, at 8. Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result depends neither on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority

of the Court believes "unfair," "indecent," or "shocking to their consciences." See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165, 172, 178 (1952). Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude on their own to be unfair or shocking to them.[6] Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document.[7] A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic

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[6] I am aware that some feel that the process employed in reaching today's decision is not dependent on the individual views of the Justices involved, but is a mere objective search for the "collective conscience of mankind," but in my view that description is only a euphemism for an individual's judgment. Judges are as human as anyone and as likely as others to see the world through their own eyes and find the "collective conscience" remarkably similar to their own. Cf. *Griswold* v. *Connecticut*, 381 U. S. 479, 518–519 (BLACK, J., dissenting) (1965); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 350–351 (BLACK, J., dissenting) (1969).

[7] To realize how uncertain a standard of "fundamental fairness" would be, one has only to reflect for a moment on the possible disagreement if the "fairness" of the procedure in this case were propounded to the head of the National Welfare Rights Organization, the President of the National Chamber of Commerce, and the chairman of the John Birch Society.

and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship which requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pretermination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits which, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial

review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an *eligible* recipient of the very means by which to live while he waits," *ante*, at 10, I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the Government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these people are too poor to hire their own advocates. Cf. *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). Thus the end result of today's decision may well be that the Government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the Government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. It should be left, as are other legislative determinations, to the Congress and the legislatures which the people elect to make our laws.

Separate dissents by MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACK joins, and by MR. JUSTICE STEWART appear at the conclusion of the Court's opinion in No. 14.